Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

WALTER T. PETERS, JR.,

Petitioner,

-v-

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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126 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously interpreted this Court's holdings in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) by holding as a matter of law that the Delaware River Port Authority of Pennsylvania and New Jersey did not violate petitioner Walter T. Peters, Jr.'s broad constitutional rights of freedom of belief and association by failing to reelect him as its Secretary solely because he is a member of the New Jersey Republican Party?

2. Whether the Delaware River Port Authority of Pennsylvania and New Jersey, a bi-state agency formed by a Compact between two independently governed states for the mutual benefit of their respective citizens, is inherently and functionally nonpartisan so that the Delaware River Port Authority cannot demonstrate that its decision to not reelect petitioner Walter T. Peters, Jr. as its Secretary, based solely upon his partisan beliefs and association, advanced a governmental, rather than a partisan, interest of overriding and vital importance as required under *Elrod v. Burns*, 427 U.S. 347 (1976)?

3. Whether in holding that the Delaware River Port Authority did not violate petitioner Walter T. Peters, Jr.'s constitutional rights of freedom of belief and association by not reelecting him Secretary solely because he is a member of the New Jersey Republican Party, the court erred by broadly focusing on whether the Delaware River Port Authority could benefit by having a Secretary with a particular political belief, instead of more narrowly focusing on whether the petitioner's political beliefs made him highly likely to be ineffective in performing his duties and responsibilities as Secretary?

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OPINIONS BELOW

The District Court for the Eastern District of Pennsylvania issued the following reports in this case: *Peters v. Delaware River Port Authority of Pa. and N.J.*, 785 F. Supp. 517 (E.D. Pa. 1992); *Peters v. Delaware River Port Authority of Pa. and N.J.*, 809 F. Supp. 13 (E.D. Pa. 1992); *Peters v. Delaware River Port Authority of Pa. and N.J.*, D.C. Civ. No. 91-06814 (E.D. Pa. March 9, 1993); *Peters v. Delaware River Port Authority of Pa. and N.J.*, D.C. Civ. No. 91-06814 (E.D. Pa. August 13, 1993).

The United States Court of Appeals for the Third Circuit issued the following reports in this case: *Peters v. Delaware River Port Authority of Pa. and N.J.*, 16 F.3d 1346 (3d Cir. 1994); *Peters v. Delaware River Port Authority of Pa. and N.J.*, App. Nos. 92-2101, 93-1278 (3d Cir. February 22, 1994).

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1254(1). On January 20, 1994, the United States Court of Appeals for the Third Circuit issued a decision reversing the judgment of the district court entered on January 8, 1993 in favor of the petitioner, and remanding the case to the district court with a direction to enter judgment for the respondent.

On February 22, 1994, the United States Court of Appeals for the Third Circuit entered an order denying petitioner's petition for panel rehearing and rehearing in banc. On April 12, 1994, the district court entered judgment for the respondent at the direction of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

In addition, the Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") was established and is governed by a Compact entered into between the two States and approved by Congress. The structure and operation of the DRPA is also governed by its By-laws. Since both the Compact and By-laws are relevant to the issues in this case but are lengthy, they are separately attached to the petitioner's appendix as Appendix H and Appendix I respectively.

STATEMENT OF THE CASE

This case is about the rights secured to all Americans under the First and Fourteenth Amendments of the United States Constitution to affiliate with the political party of his or her choice without fear of losing his or her public employment as a result. Petitioner Walter T. Peters, Jr. instituted this action on October 31, 1991 against the respondent Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") pursuant to 42 U.S.C § 1983. Petitioner served as Secretary of the DRPA between October 20, 1989 and January 20, 1991. On January 7, 1993, a jury found that the DRPA violated petitioner's constitutional right of freedom of belief and association by failing to reelect him as its Secretary at the end of his term because he is a member of the New Jersey Republican Party.

The district court entered judgment in favor of the petitioner and against respondent DRPA on January 8, 1993. On March 9, 1993, the district court issued an order and opinion upholding the verdict and award. The district court had jurisdiction by virtue of 28 U.S.C. § 1331.

Prior to trial, the district court entertained a motion for partial summary judgment filed by the DRPA, as well as motion for partial summary judgment filed by the petitioner. In its motion, the DRPA argued that it was entitled to not reelect petitioner as Secretary based upon his political beliefs since the position is one of policymaking and confidence. Petitioner argued in his motion that the position of Secretary was protected against patronage dismissal since the duties of the position, including those allegedly involving policymaking, are not related to partisan political interests and the confidential information to which he allegedly had access do not bear on partisan political concerns. This is because the DRPA is a bi-state agency, and its officers must be nonpartisan to serve effectively in light of the potentially divergent interest of two different states, which may be controlled by different political parties.

On December 11, 1992, the district court issued an order and opinion denying the respondent's motion for partial summary judgment and granting petitioner's motion for partial summary judgment. The court held that the DRPA may not dismiss or fail to reelect its Secretary based on the Secretary's political party affiliation. *Peters v. Delaware River Port Authority of Pennsylvania and New Jersey*, 809 F. Supp. 13 (E.D. Pa. 1992). The trial of this case commenced on December 28, 1992, and after six days of trial, the jury found in favor of the petitioner and awarded him $125,000. The DRPA filed two appeals with the United States Court of Appeals for the Third Circuit. The first appeal, No. 92-2101, was taken by the DRPA on December 28, 1992 from the district court's December 11, 1992 order granting partial summary judgment to the petitioner. The second appeal, No. 93-1278, was taken by the DRPA after the district court denied its renewed motion for judgment as a matter of law and for new trial. The court of appeals had jurisdiction over the appeal at No. 93-1278 pursuant to 28 U.S.C. § 1291, and the court held that it lacked jurisdiction over the appeal at No. 92-2101 since it was not a final order.

In a majority decision, the United States Court of Appeals for the Third Circuit reversed the district court and instructed the district court to enter judgment for the DRPA. The gravity of the majority's decision is aptly expressed by Judge Nygaard in his dissenting opinion:

> Simply stated, it cannot be said that party affiliation is a *requirement* for efficient performance of Peters' duties, which is the minimum the *Elrod-Branti* line of cases require if he is to be subject to political dismissal. I would therefore affirm. I believe the majority has misconstrued the rationale and purpose behind the political dismissal doctrine and broadened the exception to the point that it endangers the rule. Walter T. Peters was fired because of his political beliefs and party affiliation, and from a position where neither mattered.

Opinion of the Third Circuit Court at 41a.

In order to appreciate the gravity of the circuit court's decision, one must appreciate that the structure and function of the DRPA is nonpartisan. The DRPA was created in 1931 with the approval of Congress by a Compact between the State of New Jersey and the Commonwealth of Pennsylvania. The "public purposes" of the DRPA are set forth in Article I of the Compact and primarily include the operation and maintenance of bridges owned jointly by Pennsylvania and New Jersey across the Delaware River and between the cities of Philadelphia and Camden. Under the Compact, the "public purposes" of the DRPA include the operation, maintenance, establishment, construction, improvement, development, and promotion of bridges, railroad transportation, port facilities and commerce within the port

district. *See* Compact, Art. I. The DRPA's interaction with state municipal public bodies is expressly limited to the "public purposes" of "[c]o-operation with other bodies" interested or concerned with, or effected by the Delaware River or the port district, and "[t]o study and make recommendations to proper authorities" for improvement of port facilities. Compact, Art. I(d) and (h). All other functions performed by the DRPA must not be for its own benefit but "of mutual benefit to the Commonwealth of Pennsylvania and the State of New Jersey . . . ." Compact, Art. I(k). The Compact further provides that "[t]he effectuation of its authorized purposes by the Commission is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey . . . ." Compact, Art. XI.

The DRPA is governed by a sixteen member Board of Commissioners, eight of whom are appointed by the Governor of New Jersey for periods of five years. The Governor of Pennsylvania appoints six of the commissioners for five year terms, with the elected Auditor General and the elected State Treasurer of Pennsylvania filling the remaining two positions for their four year terms. All commissioners, other than the Pennsylvania Auditor General and State Treasurer, continue to hold office after the expiration of their terms and until their successors are appointed and qualified. Compact, Art. II. The Board of Commissions is empowered to elect various officers including a Secretary and Treasurer. Compact, Art. IV. The By-laws of the DRPA further provide that the Board is to elect a Secretary for a two year term.

Petitioner Peters became an officer of the DRPA when the Board of Commissioners elected him as Secretary on October 20, 1989 to fill a vacancy. However, the Board did not reappoint him when his term ended on January 20, 1991. As determined by a jury, the petitioner, a New Jersey Republican, was not retained as Secretary because the commissioners, at the direction of Governor

Florio of New Jersey, wanted the position for an individual affiliated with the New Jersey Democratic Party. The person who succeeded petitioner as Secretary is a Democrat, and that person was also the friend and personal pilot of Governor Florio.

The By-laws of the DRPA set forth the duties and responsibilities of the Secretary. Article III, Section D defines the office of Secretary as follows:

> The Secretary reporting to the Executive Director shall be the custodian of all records and the seal of the Authority and shall keep accurate minutes of the meetings of the Authority and all of the committees thereof. He shall, on behalf of the Authority, certify, when required, copies of records and shall execute legal instruments and documents on behalf of the Authority when ordered to do so, and affix the seal of the authority to the same, and shall perform other such duties as may be directed by the Authority.

See DRPA By-laws, Article III, Section D.

Prior to the trial, several of the commissioners admitted in deposition testimony that petitioner Peters' party affiliation did not make any difference in his ability to effectively carry out his duties as Secretary. For example, Father Rashford, who was the Chairman of the Commission, testified:

> Q. To your understanding did Mr. Peters' political party make any difference in his ability to effectively carry out the duties that he was supposed to carry out at the Delaware River Port Authority?

> A. No, I don't think party affiliation made any difference. I think what also went on though was that, in all honesty, Jean was asking Walt to take on a lot more than the Secretary ever did, and I think Walt wanted more.

As another example, Vice Chairman Burke of the Commission testified:

> Q. Is if fair to say that in your observation as New Jersey Chairman of the New Jersey delegation that Mr. Peters' party affiliation would not make him ineffective in the job he was holding?
>
> A. His party affiliation would not make him ineffective?
>
> Q. Yes, would not make him ineffective in what he was doing, he could do just as well as a Democrat or a Republican.
>
> A. Right. What he was doing was my problem, not whether he was a Democrat or a Republican.

Moreover, persons elected as officers with the DRPA had traditionally held their position until their promotion or retirement. Prior to the petitioner not being reelected as Secretary, the Executive Director, Treasurer and General Counsel had remained in their position even after the parties in control of the Pennsylvania and New Jersey delegations of the Board of Commissions for the DRPA had changed hands, and even back again. For example, the person that was Secretary prior to the petitioner had held the office approximately six years, relinquishing it only to accept another position within the DRPA.

Until 1989, the person that was the Executive Director of the DRPA held that position for approximately fifteen years until his retirement. A recent Treasurer of the DRPA held that office for more than twenty years, and a recent General Counsel to the DRPA held that office for nearly thirty years.

In reversing the judgment in favor of the petitioner, the United States Court of Appeals for the Third Circuit has stripped petitioner Peters of his First and Fourteenth Amendment rights to affiliate with a political party of his choice without fear of losing his public employment. Contrary to the teachings of this Court in *Elrod, Branti* and *Rutan,* the circuit court misconstrued the rationale and purpose behind the political dismissal doctrine and, as the dissenting judge on that panel stated, has broadened the exception to the point that it endangers the rule. It is imperative that this Court review this matter in order to remove any ambiguity concerning the requirement that a public employee cannot be dismissed for his political beliefs unless his duties necessarily impact upon *partisan* political concerns and his political beliefs are highly likely to make him ineffective in the performance of his duties, requirements the circuit court did not properly apply in this case.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHETHER EMPLOYEES OF A BI-STATE AGENCY, WHICH IS INHERENTLY AND FUNCTIONALLY NONPARTISAN, CAN BE SUBJECT TO PATRONAGE DISMISSAL BASED UPON THEIR PARTISAN BELIEFS.

The United States Supreme Court has held that the First Amendment protects public employees from being deprived of

continued employment based upon their political beliefs and association. *Elrod v. Burns,* 427 U.S. 347 (1976); *Branti v. Finkel,* 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). In *Elrod*, this Court emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. Furthermore, the interest must be "an overriding interest," *id.* at 368, "of vital importance." *Id.* at 362. This Court recognized that party affiliation may be an acceptable requirement only if an employee's private political beliefs would interfere with the discharge of his public duties since the state has a vital interest in maintaining governmental effectiveness and efficiency. *Id.* at 366. This Court placed the burden on the defendant to show that party affiliation "further(s) a vital government end by means that is least restrictive of freedom of belief and association. . . ." *Id.* at 360-63.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court, in a majority opinion, altered the test for determining which positions are excepted from the general rule against patronage dismissals. Under *Branti,* the test is not whether an employee can be labeled a "policymaker," or "confidant," but whether "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 445 U.S. at 518. This Court reasoned that "a position may be appropriately considered political even though it is neither confidential nor policymaking in character." Conversely, the court observed that it is "clear that party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* Thus, although the extent and breadth and the employee's responsibilities may be instructive, this Court has held that they are not determitive.

This Court's decisions in *Elrod* and *Branti* require the DRPA, as a threshold matter in this case, to establish that petitioner Peters' duties as Secretary necessarily relate to *partisan* political interests

and that the confidential information to which he has access bears on *partisan* political concerns. *See Branti v. Finkel*, 445 U.S. 507, 519 (1980). Both the district court and Circuit Judge Nygaard, in his dissenting opinion, properly concluded that officers of the DRPA, including the Secretary, cannot be dismissed based upon their political beliefs since the DRPA is inherently and functionally nonpartisan.

The conclusions of the district court and Circuit Judge Nygaard were well reasoned. The district court stated:

> The duties of Secretary cannot involve partisan political interest, for the simple reason that the Secretary does not serve an organization designed to further the political agenda of any one elected administration or officeholder . . . The authors of the Compact sought to prevent either state from ever obtaining dominance over the other. Thus, the Compact provides not only equal state representation but also requires that all actions must be passed by a majority of the representatives of each state rather than by a simple majority of [the] Board (Compact Art. III.) Under this scheme, the Secretary of the DRPA necessarily must be loyal to DRPA as a whole and not to either state or to any particular commissioner. If anything, the nature of the position compels the conclusion that the Secretary must be non-political to serve effectively in light of the potentially divergent interest of two different states, two different gubernatorial administrations, and the independently elected Auditor General and State Treasurer of Pennsylvania.

Peters v. Delaware River Port Authority of Pa. and N.J., 809 F. Supp. 13, 16-17 (E.D. Pa. 1992).

Circuit Judge Nygaard states in his dissent that "[t]he majority strides mightily to demonstrate how the structure, organization and functions of the DRPA relate to a political party's interest. It is unable, however, to refute the reasoning of the district court that, although the DRPA no doubt has 'broad powers' (as do many government agencies and businesses), it is inherently and functionally nonpartisan." Opinion of the Third Circuit Court at 38a. In addition to the reasons stated by the district court, Circuit Judge Nygaard supports the conclusion that the DRPA was intended to be insulated from partisan politics by the fact that except for two *ex officio* members from Pennsylvania, the commissioners served for five-year terms, while the term of the New Jersey and Pennsylvania governors is four years. Opinion of the Circuit Third Court at 40a. This demonstrates that the drafters of the Compact intended to keep the DRPA out of patronage and partison politics. Since if the converse was true, then commissioners and governors would have concurrent terms.

Moreover, the Executive Director and other officers of the DRPA are charged with executing the policies set by the Board of Commissioners. As such, the officers work directly for the Board, and its appointed and elected commissioners, rather than the governors of Pennsylvania and New Jersey. Depending upon the political make-up of the commissioners, the officers of the DRPA work for both Democrats and Republicans. This is because the governors of New Jersey and Pennsylvania may be of opposite parties, and their appointments to the Board of Commissioners would therefore include both Democrats and Republicans, who would join the independently elected Auditor General and State Treasurer of Pennsylvania to form the Board of Commissioners. Because the officers of the DRPA, including its Secretary, owe their allegiance to the Board, their duties must necessarily be

carried out in a nonpartisan manner. There must also be a free flow of information between the officers and employees of the DRPA so as to fulfill the dictates of the Board. Thus, there can be no "confidentiality" between the officers along partisan political lines. Once policy decisions are adopted by the Board, the sole function of the officers and employees is to effectuate that policy.

In sum, the nonpartisan political nature of the position of Secretary is shown by a simple question not answered by the United States Court of Appeals for the Third Circuit. If the Commonwealth of Pennsylvania appointed and elected eight Republicans as commissioners to the Board of the DRPA and the State of New Jersey appoints eight Democrats as commissioners, then to what political party and partisan interest should the Secretary belong and be loyal: Republican or Democrat? The answer is that the Secretary cannot exercise his duties and responsibilities in a partisan manner since the DRPA is itself inherently nonpartisan. Therefore, the DRPA was not advancing an overriding interest of vital importance, in the least restrictive manner possible, when it decided not to reelect Peters as Secretary at the end of his term based solely upon his partisan political beliefs and association. The DRPA, therefore, violated his constitutional rights of freedom of belief and association.

In holding that Peters was not entitled to the constitutional protection afforded under the *Elrod-Branti* line of cases, the majority of the circuit court stated:

> No Supreme Court decision, or any other decision of which we are aware, has held or even suggested that merely because of a government entity is composed of membership from more than one state, the exception to *Branti-Elrod* would not apply to positions within that entity. Rather, the Supreme Court

> has directed that we focus on the nature of the responsibilities of the particular position in question, *Elrod*, 427 U.S. at 367, 96 S. Ct. at 2687, and we focus on the functions of the particular position to determine if the officerholder "acts as an advisor or formulates plans for the implementation of broad goals," *id.* at 368, 96 S. Ct. at 2687, *quoted in Zold*, 935 F. 2d at 625. There is little reasons to believe, *a priori*, that merely because a government entity is composed of membership from more than one state that the officers employed by that entity cannot formulate plans or implement broad goals.

Opinion of the Third Circuit Court at 21a-22a. However, the majority failed to consider the threshold issue of whether the duties of Secretary impacted upon *partisan* political concerns and, instead, focused solely upon whether his duties were such that they would befit the title policymaker, *i.e.*, whether he acted as an advisor or formulated plans for the implementation of broad goals.

By failing to consider whether the DRPA, in function and structure, is or is not a partisan entity, the majority of the circuit court failed to provide petitioner Peters with the protection he is entitled to under the First and Fourteenth Amendments of the United States Constitution. If the DRPA is a nonpartisan agency, as both the district court and the dissenting circuit judge found, then the DRPA cannot meet its burden of showing that the duties of Secretary are related to partisan political interests and that any confidential information to which he may have had access bears on partisan political concerns. Not being able to demonstrate this, the DRPA could not base its decision not to reelect petitioner Peters as Secretary solely upon his political beliefs and association. By holding that the DRPA could, the circuit court decided this

important federal question in a way that conflicts with this Court's decisions in *Elrod* and *Branti*. Moreover, to the extent that this Court has not applied the "partisan" criteria of *Elrod* and *Branti* to a bi-state agency, this is an important issue of federal law which has not been, but should be, settled by this Court. Hence, petitioner Peters requests this Court to review this matter.

II.

THE TEST APPLIED BY THE THIRD CIRCUIT COURT FOR DETERMINING WHETHER THE POSITION OF SECRETARY OF THE DRPA WAS WITHIN THE *ELROD-BRANTI* EXCEPTION WAS CONTRARY TO THE HOLDINGS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.

In holding that the United States Constitution does not protect Peters from patronage dismissal, the majority of the circuit court limited its inquiry to whether the Secretary of the DRPA acts as an advisor or formulates plans for implementation of broad goals. Opinion of the Third Circuit Court at 22a, 30a. However, in doing so, the circuit court used a far broader test then the narrow test established by this Court in its decisions in *Elrod* and *Branti*.

In both *Elrod* and *Branti*, this Court held that only if the employee's political beliefs would (not "could") interfere with the performance of his or her duties, could an employee's constitutional rights be overridden and the employee discharged for political reasons. *Elrod*, 427 U.S. 347, 366 (1976); *Branti*, 445 U.S. 507, 517 (1980). Moreover, the employer's patronage practices must be "narrowly tailored to further vital governmental interests . . . ." *Rutan*, 497 U.S. 62, 100 S. Ct. 2729, 111 L. Ed. 2d 52,66 (1990).

The decision by the majority of the circuit court is at variance

not only with this Court but also of other federal courts of appeals. In this case, the circuit court held that Peters' responsibilities at the DRPA fell within the *Elrod-Branti* exception since his job description states that the Secretary is to take part in policy-forming discussions, promote projects and manage a budget. *See* Opinion of the Third Circuit Court at 29a-32a. However, in *Savarese v. Agriss*, 883 F. 2d 1194 (3d Cir. 1989), the Third Circuit affirmed the district court's decision that the Monroe County Transportation Authority's patronage dismissal of its director and controller was unconstitutional. The director controlled the Authority personnel, bus operations, and the budget. *Id.* at 1196. Other federal appeal courts that have also held that positions similar to the Secretary of the DRPA are protected from patronage dismissal include: *DeChoudens v. Governmental Development Bank*, 801 F.2d 5, 8-10 (1st Cir. 1989) (senior vice president of Development Bank); *Jones v. Dodson*, 727 F.2d 1329, 1338-39 (4th Cir. 1984) (deputy sheriff); *Gibbons v. Bond*, 668 F.2d 967, 968-69 (8th Cir. 1982) (branch manager of Department of Revenue); *Barns v. Bosley*, 845 F.2d 501, 508 (8th Cir. 1984) (deputy court clerk and supervisor); *see also Crisp v. Bond*, 536 F. Supp. 137 (W.D. Mo. 1982) (assistant director of the Division of Motor Vehicle and Driver Licensing): *DeLaCruz v. Pruitt*, 590 F. Supp. 1296, 1301-02 (N.D. Ind. 1984) (supervisor in branch of County Auditor's Office); *Gannor v. Daley*, 561 F. Supp. 1377, 1386 (N.D. Ill. 1983) (administrative assistant to State's Attorney Office).

The conflict between the circuit courts and their administration of the *Elrod-Branti* test to similar positions of public employment can be attributed to the ambiguity of the test itself. In *Branti*, this Court said the test was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. As Justice Scalia noted in his dissenting opinion in *Rutan*, the courts of appeals have devised

various tests, with differing results, for determining when "affiliation is an appropriate requirement." *See Rutan*, 497 U.S. 62, 100 S. Ct. 2729, 111 L. Ed. 2d at 90.

In order to achieve consistency in this important area of First Amendment rights, this Court should further define the standard for determining whether a public job may be subjected to patronage dismissal without violating the employee's constitutional rights. The appropriate standard was adopted by the Court of Appeals for the Third Circuit, but rejected in this case. In three cases prior to *Peters*, the Third Circuit had further defined the *Elrod-Branti* burden and set forth a standard that only when a difference in political affiliation is "highly likely" to make the employee ineffective may a partisan politically motivated dismissal past constitutional muster. *See Waskovich v. Moraani*, 2 F.3d 1291, 1297 (3d Cir. 1993); *Zold v. Township of Mantua*, 935 F.2d 622, 635 (3d Cir. 1991); *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981). The "highly likely" standard is the natural outgrowth of this Court's rule that the employee's political beliefs must *interfere* with the performance of his job duties in order to demonstrate an "overriding" and "vital" governmental interest and therefore fall within the narrow exception for political dismissals.

As Circuit Judge Nygaard stated in his dissent in this case, the majority dismissed the "highly likely" standard "as essentially mere dictum . . . I disagree." Opinion of the Third Circuit Court at 36a. In its decision, the majority of the circuit court failed to focus on whether Peters' political beliers made him *ineffective* in performing his duties and responsibilities as Secretary, or even whether the DRPA had demonstrated an overriding and vital *need* for officers with particular political beliefs. Instead, the majority focused on whether, under certain strained circumstances, the DRPA could benefit by having a Secretary with a particular political belief. For example, the majority supported their holding by stating that the party affiliation or policy views of the officers of

the DRPA "*could* be relevant to the effective presentation and implementation of particular policy goals." Opinion of the Third Circuit Court at 24a (emphasis added). The majority further states in its opinion that the DRPA "might legitimately prefer," as opposed to need, individuals with a particular political persuasion. *Id.* at 24a.

The majority does not state anywhere in its opinion that Peters could not effectively perform the duties and responsibilities of Secretary due to his affiliation with the New Jersey Republican Party. The evidence, of course, was to the contrary. Both the Chairman and Vice Chairman of the Board of Commissioners of the DRPA testified in deposition prior to trial that Peters' political beliefs and association did not have any impact on his effectiveness as Secretary of the DRPA.

The majority's decision in this case was not only erroneous since the DRPA is a nonpartisan entity, so that Peters' personal political beliefs and association cannot impact upon any partisan interest or concerns of his employer, but also because the standard employed by the circuit court was overly broad and endangers the political dismissal doctrine. The decision is inconsistent with the requirement in *Elrod-Branti* that the DRPA had to demonstrate an overriding and vital governmental interest and that the least restrictive means for fostering those interests were used. *See Rutan*, 111 L. Ed. 2d at 63. The vagueness of the *Elrod- Branti* standard has permitted the circuit court in this case to erode the constitutional rights of freedom of belief and association of petitioner Peters and those similarly situated, and it is vitally important for this Court to articulate a more manageable standard to be applied in patronage dismissal cases, one that clearly sets forth that the *Elrod-Branti* exception is narrow and only applies when the public authority can demonstrate that the employee's political beliefs or association would make him highly likely to be ineffective in the performance of his duties and responsibilities, a burden not met by the DRPA in this case.

CONCLUSION

Based upon the foregoing arguments and authority, the petitioner, Walter T. Peters, Jr., respectfully requests that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 20, 1993, in which the circuit court reversed a judgment entered in favor of the petitioner.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 22, 1994

WALTER T. PETERS, JR. v. DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY, Appellant

Nos. 92-2101, 93-1278

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

1994 U.S. App. LEXIS 3438

February 22, 1994, Decided

PRIOR HISTORY: [*1] Original Opinion of January 20, 1994, Reported at 1994 U.S. App. LEXIS 851.

JUDGES: BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges

OPINION BY: BY THE COURT; ROBERT E. COWEN

OPINION: SUR PETITION FOR REHEARING

The petition for rehearing filed by appellee having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix A

Judge Nygaard would have granted rehearing in banc.

By the Court,

Robert E. Cowen

Circuit Judge

Dated: FEB 22 1994

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 20, 1994

United States Court of Appeals
for the Third Circuit

Nos. 92-2101 & 93-1278

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 91-06814)

Present: Hutchinson, Cowen and Nygaard, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 5, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 8, 1993, be, and the same is hereby reversed and the cause is remanded to the District Court with direction to enter judgment for the Delaware River Port Authority of Pennsylvania and New Jersey. The appeal at No. 92-2101 is dismissed for lack of

jurisdiction. Parties to bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: January 20, 1994

Certified as a true copy and issued in lieu
of a formal mandate on March 2, 1994

Teste: P. Douglas Sisk
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 20, 1994

Filed January 20, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-2101 & 33-1278

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 91-06814)

Argued October 5, 1993

Before: Hutchinson, Cowen and Nygaard
Circuit Judges

(Filed January 20, 1994)

John M. Elliott (Argued)
Mark J. Schwemler
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Appendix C

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

Walter T. Peters ("Peters") filed a complaint alleging that the Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") violated his constitutional rights of freedom of belief and association by failing to reappoint him as its Secretary solely because he is a member of the New Jersey Republican Party. In a pretrial application, the district court ruled that the position of Secretary was not a politically sensitive position. Accordingly, the district court held that Peters' position as Secretary was protected by the First Amendment from termination by reason of his political affiliation. The case was thereafter tried to a jury, which rendered a verdict in favor of Peters. The ultimate question presented in this appeal is whether party affiliation is an appropriate requirement

for the effective performance of the position of Secretary of the DRPA. Because we find that it is, we will reverse and direct the district court to enter judgment in favor of the DRPA.

I.

The DRPA is an agency of Pennsylvania and New Jersey, formed by a Compact (the "Compact") between these two states that was formally approved by Congress.[1] The DRPA was created, among other things, to operate and maintain the bridges owned jointly by Pennsylvania and New Jersey across the Delaware River and between the cites of Philadelphia and Camden. Under the Compact, the DRPA has the authority to construct and maintain facilities for the transportation of passengers, to improve and develop the Port District[2] for port purposes, and to promote commerce on the Delaware River. It may also establish, maintain, and operate a rapid transit system between certain points in New Jersey and Pennsylvania. Compact art. I.

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1. The Compact has been formally approved by the legislatures of both Pennsylvania and New Jersey. Pa. Stat. Ann. tit. 36, § 3503 (1961 & Supp. 1993); N.J. Stat. Ann. §§ 32:3-1 to -18 (West 1990 & Supp. 1993) [hereinafter the "Compact"]. Such a compact requires congressional approval. The Constitution provides: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." U.S. Const. art. I, § 10, cl. 3. The consent of Congress was originally given by Act of June 14, 1932. ch. 258, 47 Stat. 308. Congress consented to the most recent amendments to the Compact by Act of Oct. 27. 1992. 106 Stat. 3576.

2. The Port District includes "all the territory within the counties of Bucks. Chester, Delaware. Montgomery and Philadelphia in Pennsylvania and all the territory within the counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean and Salem in New Jersey." Compact art. XIII.

Appendix C

The DRPA is governed by a sixteen-member Board of Commissioners, eight of whom are appointed by the Governor of New Jersey for periods of five years. Compact art. II. The Governor of Pennsylvania appoints six of the commissioners for five-year terms, with the elected Auditor General and the elected State Treasurer of Pennsylvania filling the remaining two positions for their four-year terms. Compact art. II. All commissioners, other than the Pennsylvania Auditor General and State Treasurer, continue to hold office after the expiration of their terms and until their successors are appointed and qualified. Compact art. II. The Board of Commissioners is empowered to elect various officers including a Secretary. Compact art. IV (d). The By-laws of the DRPA provide that the Board is to elect the Secretary for a two-year term.

Peters became an officer of the DRPA when the Board of Commissioners elected him as Secretary on October 20, 1989 to fill a vacancy. However, the Board did not reappoint him when his term ended in January, 1991. Peters, a New Jersey Republican, claims that he was not retained because the Board wanted the position for an individual affiliated with the New Jersey Democratic Party. The person who succeeded Peters as Secretary is a Democrat.

Peters brought this suit pursuant to 42 U.S.C. § 1983, alleging that the commissioners violated his constitutional rights by not reappointing him solely because of his political affiliation. The district court entered two orders which are the subject of this appeal. The DRPA moved for summary judgment, arguing that it was an arm or instrumentality of both the Commonwealth of Pennsylvania and the State of New Jersey and, therefore, not subject to suit under 42 U.S.C. § 1983. In its March 6, 1992 decision, the district court denied defendant's motion for summary

judgment, holding that the DRPA was a "person" for purposes of 42 U.S.C. § 1983. *Peters v. Delaware River Port Auth. of Pa and N.J.*, 785 F. Supp. 517, 518-21 (E.D. Pa. 1992).

In that same decision, the district court also addressed the DRPA's argument that it was entitled to summary judgment because the position of Secretary of the DRPA was a policymaking or confidential position, and party affiliation is a constitutionally acceptable requirement for the position. The district court initially determined that genuine issues of material fact existed, and denied defendant's motion. *Id.* at 521-22. At the conclusion of discovery, the district court again entertained the question of whether party affiliation is a constitutionally acceptable requirement for the position of Secretary. In the second decision which we review in this appeal, the district court determined that the bi-state nature of the DRPA mandates that the function of the Secretary be carried out in a non-political manner. It denied defendant's motion for summary judgment and granted plaintiff's motion for partial summary judgment. *Peters v. Delaware River Port Auth. of Pa and N.J.*, 809 F. Supp. 13, 15-18 (E.D. Pa. 1992). The effect of the court ruling was to foreclose the DRPA from taking into account political considerations when making personnel decisions regarding the office of Secretary. The case then proceeded to trial with the jury returning a verdict in favor of Peters. The district court had jurisdiction by virtue of 28 U.S.C. § 1331. We have jurisdiction over the appeal at No. 93-1278 pursuant to 28 U.S.C. § 1291.[3]

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3. The district court's grant of partial summary judgment appealed at No. 92-2101 did not end the litigation and left issues to be decided at trial. The order was therefore not a final order under 28 U.S.C. § 1291, and we find no other basis for appellate jurisdiction. Thus, we lack jurisdiction over the appeal at No. 92-2101 and it will be dismissed. We will, however, consider all of the issues raised at No. 92-2101 as part of our resolution of the appeal at No. 93-1278.

Appendix C

II.

We apply the same standards as the district court when it considered the summary judgment motions. *Waldorf v. Shuta*, 896 F.2d 723, 728 (3d Cir. 1990). Our review is plenary. *Id.* We must consider all of the facts and inferences in the light most favorable to the nonmoving party. *Waskovich v. Morgano*, 2 F.3d 1292, 1296 (3d Cir. 1993). The moving party can prevail in its motion for summary judgment only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Waldorf*, 896 F.2d at 728.

III.

A. The DRPA's Amenability to Suit Under 42 U.S.C. § 1983

We first consider the contention of the DRPA that it is not amenable to suit under § 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), the Supreme Court held that a state is not a "person" under 42 U.S.C. § 1983,[4] and is

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4. Section 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

therefore not amenable to suit under that statute. *Id.* at 65-67, 70, 109 S. Ct. at 2309, 2311. The Court based this holding in part on the immunity to suit in federal court which the Eleventh Amendment provides to states. *Id.* The Court held that the rule that a state is not a person under § 1983 "applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70, 109 S. Ct. at 2311. The DRPA argues that it is an arm of the state for Eleventh Amendment purposes, and is therefore not a "person" under § 1983.[5]

The district court determined that for purposes of the Eleventh Amendment the DRPA is not an arm of either Pennsylvania or New Jersey, and denied the DRPA's motion for summary judgment on this ground. 785 F. Supp. at 518-21. The district court's reasoning and conclusion concerning this issue is thorough and persuasive. We agree with that portion of the opinion of the district court concerning the DRPA's amenability to suit under § 1983.

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5. While the Court in *Will* stated that the scope of the Eleventh Amendment is a consideration when interpreting § 1983, it pointed out that the scope of the Eleventh Amendment and the scope of § 1983 are separate issues. 491 U.S. at 66-67, 109 S. Ct. at 2309.

In the matter presently before us, the DRPA's only grounds for contending that it is not a "person" are the arguments based on the Eleventh Amendment and *Will* that are discussed below. Therefore, we do not consider whether the DRPA's position that it is not a "person" under § 1983 is supported by any legislative history of that statute or by cases dealing with issues other than the Eleventh Amendment. In *Bolden v. Southeastem Pa Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991), *cert denied*, __ U.S. __, 112 S. Ct. 2281 (1992), the defendant, just as the DRPA here, claimed that it was not a "person" under § 1983. *Id.* at 821. We stated that when stripped of its Eleventh Amendment component, the argument that the defendant was not a "person" under § 1983 did not raise any question of federal jurisdiction unless the claim that the defendant was a " 'person' was made in bad faith or was 'wholly insubstantial and frivolous.' " *Id.* The instant action raises no such concerns.

Appendix C

We have previously set forth criteria to be considered in determining whether an entity is an alter ego of a state for Eleventh Amendment purposes. *Bolden v. Southeastem Pa. Transp. Auth.*, 953 F.2d 807, 814-18 (3d Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 2281 (1992); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir.), *cert. denied*, 493 U.S. 850. 110 S. Ct. 148 (1989). We have condensed these criteria into three general factors: (1) whether, in the event plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four factors: how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency has. *Bolden*, 953 F.2d at 816. The first of the three factors is the most important one. *Id.* at 816, 818.

1. *Funding*. The first factor, whether the source of payment for any judgment would come from either New Jersey or Pennsylvania, weighs heavily against finding that the DRPA is an alter ego of either New Jersey or Pennsylvania for purposes of the Eleventh Amendment. According to the Compact, the DRPA is financially self-sustaining, raising revenues by means of bonds, tolls and rent collections. Compact arts. IV (1). VIII. Moreover, the Compact specifically provides that the DRPA has no power to pledge the credit or create any debt of elther Pennsylvania or New Jersey. Compact art. VII. Hence, the debts of the DRPA are not the debts of either state.

The DRPA was initially funded by contribution from both

states. However, that factor has become irrelevant, since the DRPA is now financially self-sustaining. Any judgment against the DRPA would not come from either state treasury, but rather from the DRPA itself.

In *Fitchik* we found that the New Jersey Transit Rail Operations, Inc. ("NJTRO") was not an arm of New Jersey even though the state provided approximately thirty-three percent of the NJTRO's revenues. 873 F.2d at 660-61, 664. Likewise, in *Bolden* we concluded that the Southeastern Pennsylvania Transportation Authority ("SEPTA") was not an alter ego of the state even though Pennsylvania provided twenty-seven percent of its revenues. 953 F.2d at 819, 821. In comparison to NJTRO and SEPTA, the DRPA is self-sustaining and not dependent on either state for funding, clearly dictating that it, like the NJTRO and SEPTA, is not an arm of New Jersey or Pennsylvania. The funding factor, the most important of the three factors, weighs very heavily in support of the conclusion that the DRPA is not the alter ego of either state for purposes of the Eleventh Amendment.

2. *Status under state law.* The second factor to consider in determining whether the DRPA is an alter ego of New Jersey or Pennsylvania is the status which it has under state law. In *Yancoskie v. Delaware River Port Auth.*, 478 Pa. 396, 387 A.2d 41 (1978), the Pennsylvania Supreme Court held that the DRPA was, not an arm of the Commonwealth and not entitled to sovereign immunity. The court stated:

> We believe that an analysis of the legislative acts defining the purposes and powers of the Delaware River Port Authority, together with the relevant judicial decisions, requires a conclusion that . . . the Authority is not "an

> integral part of the Commonwealth" and that it is therefore subject to suit, as are "political subdivisions or governmental entities other than the Commonwealth itself."

Id. at 398-99, 387 A.2d at 42 (citations omitted).

Similarly, the New Jersey Supreme Court has held, in a personal injury suit, that the DRPA is not treated as a "public entity" within the New Jersey Tort Claims Act and therefore does not enjoy immunity under that Act. *Bell v. Bell,* 83 N.J. 417, 423, 416 A.2d 829, 832 (1980).

Like SEPTA in *Bolden* and NJTRO in *Fitchik,* the DRPA possesses "attributes not characteristic of an arm of a state." *Bolden,* 953 F.2d at 820. For example, the DRPA has the power to enter into contracts and to make purchases without state approval. Compact art. IV (f)-(h); *see Bolden,* 953 F.2d at 820. On the other hand, like SEPTA in *Bolden* and NJTRO in *Fitchik,* the DRPA possesses some attributes under state law which are normally associated with the state. These include the exemption from state property taxation, Compact art. XI, and the power of eminent domain, Compact art. IV (k); *Bolden,* 953 F.2d at 820. However, on balance, and especially in light of the clear holding in *Yancoskie* by the Pennsylvania Supreme Court that the DRPA is not " 'an integral part of the Commonwealth.' " 478 Pa. at 406, 387 A.2d at 46, the DRPA's status under state law weighs heavily in support of the conclusion that the DRPA is not an arm of either state.

3. *Autonomy.* The third factor to consider in determining whether the DRPA is an arm of New Jersey or Pennsylvania is the

degree of autonomy from state control which the DRPA enjoys. There is in fact a significant measure of state control over the DRPA. This control is exercised most directly by the states through the appointment of the sixteen members of the Board of Commissioners (the "Board"). As noted above, the Board is the, ruling body of the DRPA. Membership of the Board is split evenly, with eight members from New Jersey and eight from Pennsylvania. Compact art. II. The Governor of New Jersey appoints all that state's members while the Governor of Pennsylvania appoints six of the eight members representing the Commonwealth. *Id.* The other two Pennsylvania Commissioners are the Auditor General and the State Treasurer who serve ex-officio. *Id.*

Other facts support the argument that the DRPA is autonomous, such as the DRPA's separate corporate existence, Compact art. I, its power to enter into contracts, Compact art. IV (f), its power to hold property, Compact art. IV (g), (h), and its power to set and collect tolls, Compact arts. IV (j), VIII. On balance, however, the significant control the states have through appointing the DRPA's Board weighs slightly in favor of the DRPA's being an alter ego of the states. *See Fitchik*, 873 F.2d at 663-64 (substantial degree of control over the New Jersey Transit Corporation ("NJT") by the governor weighed "slightly" in favor of according immunity to the NJT).

4. *The totality of factors.* Having considered each of the three factors above, we now must balance the three factors in their totality. *See Bolden*, 953 F.2d at 821. Since two of the three factors weigh heavily against a finding that the DRPA is an arm of a state, including the first and most important factor of funding, the balance is clearly struck against a finding that the DRPA is an alter

ego of either New Jersey or Pennsylvania.[6]

Consequently, because the DRPA is not an arm of either state, the position of the DRPA that it is not a "person" under § 1983 fails. We hold that the DRPA is amenable to suit under that statute.[7]

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6. The DRPA cites *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979), in support of its argument that as a bi-state entity formed through interstate compact, it is entitled to Eleventh Amendment immunity. However, as the Supreme Court in *Lake Country Estates* stated:

> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves. and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

Id. at 401, 99 S.Ct. at 1177. Our Eleventh Amendment analysis above reveals that the DRPA is not entitled to Eleventh Amendment immunity.

7. *See supra* note 5. The DRPA relies heavily on our decision in *Port Auth. Police Benevolent Ass'n. Inc. v. Port Auth. of N.Y. and NJ.*, 819 F.2d 413 (3d Cir.). *cert. denied*, 484 U.S. 953. 108 S. Ct. 344 (1987) (hereinafter "*PBA*"), in support of its position that the DRPA is an alter ego of Pennsylvania or New Jersey. However, the government entity involved in *PBA*, the Port Authority of New York and New Jersey (the "Authority"), is substantially different from the DRPA. For example, in *PBA*, we found that any judgment against the Authority could have some impact upon the state treasury. *Id.* at 416. Moreover, we noted in *PBA* that the courts of New York and New Jersey have consistently held that the Authority is a state agency performing functions

(Cont'd)

Appendix C

B. The *Branti-Elrod* Claim

Having concluded that the DRPA is amenable to suit under § 1983, we now address the merits of Peters' substantive constitutional claim. Peters claims that the DRPA infringed his constitutional rights of free speech and association by failing to reappoint him as its Secretary solely because he is a member of the New Jersey Republican Party.

The Supreme Court has held that it is a violation of a public employee's First Amendment rights to demote, transfer, fire, or not reappoint to a position, such an employee on the basis of his or her political affiliation. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, __, 110 S. Ct. 2729, 2736-39 (1990); *Branti v. Finkel*, 445 U.S. 507, 511-20, 100 S. Ct. 1287, 1291-96 (1980); *Elrod v. Burns*, 427 U.S. 347, 355-73, 96 S. Ct. 2673, 2680-89 (1976). However, the Court has recognized exceptions to this rule. Party affiliation may be an acceptable requirement for an employee who "acts as an adviser or formulates plans for the implementation of broad goals." *Elrod*, 427 U.S. at 368, 96 S. Ct. at 2687.

In *Branti* the Court described the test for the exception as such: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S. Ct. at 1295.

(Cont'd)
on behalf of the state. *Id.* at 415. Finally, we found in *PBA* that the actions of the commissioners of the Authority are subject to veto by the governor of either New York or New Jersey. *Id.* at 417. Therefore, we find that our decision in *PBA* is distinguishable and not controlling in this case.

In making this determination, we examine the functions performed by the individual occupying the relevant position. *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993). As the Supreme Court explained, "[t]he nature of the responsibilities is critical." *Elrod*, 427 U.S. at 367, 96 S. Ct. at 2687. Although "[e]ach decision is . . . fact specific for that case," *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir. 1991), a question relevant in all cases is "whether the employee has 'meaningful input into decision making concerning the nature and scope of a major government program.' " *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982)).

> [I]t is appropriate to consult factors such as 'whether the employee's duties are simply . . . nondiscretionary or technical, . . . whether the employee participates in . . . discussions or other meetings, whether the employee prepares budgets or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers.'

Waskovich, 2 F.3d at 1297 (quoting *Brown*, 787 F.2d at 169).

We also focus our analysis on " 'the function[s] of the public office in question and not the actual past duties of the particular employee involved.' " *Id.* (quoting *Brown*, 787 F.2d at 168); *see also O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993) (" 'the *actual* past duties of the discharged employee are irrelevant if the position *inherently* encompasses more expansive powers and more important functions that would tend to make political affiliation an

appropriate requirement for effective performance' " (citation omitted)), *cert. denied,* No. 93-498, 1993 WL 417857 (U.S. Dec. 13, 1993); however, while the actual duties performed by the officeholders are not determinative, they may be informative. *Waskovich,* 2 F.3d at 1300.

"It is not always easy to determine whether political affiliation is a legitimate factor to be considered for a particular job," *Zold,* 935 F.2d at 635, and each decision is fact specific. We have held that party affiliation may be the basis for dismissal of a director of a veterans' organization, *Waskovich,* 2 F.3d at 1298-1303; an assistant director of public information, *Brown,* 787 F.2d at 169-70; assistant district attorneys, *Mummau v. Ranck,* 687 F.2d 9, 10 (3d Cir. 1982) *(per curiam)*; and city solicitors and assistant city solicitors, *Ness,* 660 F.2d 517, 522-23 (3d Cir. 1981). On the other hand, we have held that *Branti-Elrod* protection extends to deputy sheriffs, *Burns v. County of Cambria Pa.,* 971 F.2d 1015, 1023 (3d Cir. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 1049 (1993); deputy township clerks, *Zold,* 935 F.2d at 636-40; and a county's second deputy recorder of deeds, *Furlong v. Gudknecht,* 808 F.2d 233, 236-37 (3d Cir. 1986).

Although the plaintiff in a *Branti-Elrod* action has the ultimate burden of proof to demonstrate that her First Amendment rights have been infringed because of her political affiliation, *Zold,* 935 F.2d at 640, the defending government entity has the burden of proof to demonstrate that an encroachment on an employee's First Amendment rights falls within the exception for employment where the party affiliation of the officeholder is appropriate. *Elrod,* 427 U.S. at 368, 96 S. Ct. at 2687; *Zold,* 935 F.2d at 635.

Peters asserts that the DRPA must demonstrate that party affiliation is "highly likely" to cause him to be ineffective in

carrying out the duties and responsibilities of the office of Secretary. However, in *Ness*, we merely stated that "we would *at least* conclude that should a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, dismissals for that reason would not offend the First Amendment." 660 F.2d at 521 (emphasis added). This language indicates that for the exception to apply it would be *sufficient* for a defending government entity to demonstrate that a difference in party affiliation would be highly likely to cause an official to be ineffective in carrying out her duties; but we did not suggest that such a showing *is necessary* in every case. Absent further direction from the Supreme Court, we will apply the test announced in *Branti*, and consider "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S. Ct. at 1295.

"If there is no material factual dispute as to whether political affiliation is a permissible job requirement, summary judgment is appropriate." *Waskovich*, 2 F.3d at 1296. In this case, we have available the essential facts concerning the duties of the office in question, and the parties disagree as to how the job of Secretary should be characterized. Since our standard of review of summary judgment determinations is plenary, it is appropriate for us to determine whether, as a matter of law, the position of Secretary falls under the exception to *Branti-Elrod*. *See Zold*, 935 F.2d at 636.

The district court determined that the exception to *Branti-Elrod* could not apply to the position of Secretary. In its holding, it stated that the bi-state nature of the DRPA mandates that the functions of the Secretary be carried out in a non-political manner. *Peters v. Delaware River Port Auth. of Pa. and N.J.*, 809 F. Supp. at 13, 16-17. The court reasoned as follows:

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> The duties of the Secretary cannot involve partisan political interests, for the simple reason that the Secretary does not serve an organization designed to further the political agenda of any one elected administration or officeholder. . . . The authors of the Compact sought to prevent either state from ever obtaining dominance over the other. Thus, the Compact provides not only equal state representation but also requires that all actions must be passed by a majority of the representatives of each state rather than by a simple majority of Board [sic] (Compact, Art. III). Under this scheme, the Secretary of the DRPA necessarily must be loyal to DRPA as a whole and not to either state or to any particular commissioner. If anything, the nature of the position compels the conclusion that the Secretary must be non-political to serve effectively in light of the potentially divergent interests of two different states, two different gubernatorial administrations, and the independently elected Auditor General and State Treasurer of Pennsylvania.

Id.

We reject the district court's reasoning. No Supreme Court decision, or any other decision of which we are aware, has held or even suggested that merely because a government entity is composed of membership from more than one state, the exception to *Branti-Elrod* would not apply to positions within that entity. Rather, the Supreme Court has directed that we focus on the nature

of the responsibilities of the particular position in question, *Elrod*, 427 U.S. at 367, 96 S. Ct. at 2687, and we focus on the functions of the particular position to determine if the officeholder "acts as an adviser or formulates plans for the implementation of broad goals," *id.* at 368, 96 S. Ct. at 2687, *quoted in Zold*, 935 F.2d at 635. There is little reason to believe, *a priori*, that merely because a government entity is composed of membership from more than one state, that the officers employed by that entity cannot formulate plans or implement broad goals. Furthermore, the mere fact that an entity is composed of membership from more than one state does not suggest that party affiliation will be irrelevant to the effective performance of the offices within that entity.

The DRPA has broad powers, leaving much room for principled disagreement on policy goals or their implementation.[8]

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8. The dissent takes the majority to task for stating that there is "room for principled disagreement on policy goals or their implementation." Dissent typescript at 28. Whether a position involves government decisionmaking on issues where there is room for principled disagreement on policy goals is a question which at least five other courts of appeals consider in evaluating *Branti-Elrod* claims. *O'Connor v. Steeves*, 994 F.2d 905, 910 (1st Cir.), *cert. denied*, No. 93-498, 1993 WL 417857 (U.S. Dec. 13, 1993); *Green v. Henley*, 924 F.2d 185, 186-87 (10th Cir. 1991); *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988); *Ray v. City of Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988); *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982).

Arguing that the majority has not demonstrated that the position of Secretary of the DRPA has a nexus to partisan processes, Judge Nygaard compares the position of Secretary to a football coach, dissent typescript at 28, and a pothole repair supervisor, *id.* at 29. We do not find these analogies apt. Not only is there room for principled disagreement in the higher positions within the DRPA, but there are also political and partisan considerations and consequences involved with the DRPA's higher offices which the majority would agree do not arise for football coaches and pothole repairmen.

For example, in addition to operating its current facilities, the Compact charges the DRPA with developing a master economic plan for the Port District. Compact art. XII (7). "Prior to adopting such master plan, the commission shall give written notice to, afford a reasonable opportunity for comment, consult with and consider any recommendations from State, county and municipal government, as well as, commissions, public corporations and authorities and the private sector." *Id.* Such consultation and interaction with government officials and private corporations concerning the development of a major economic plan will surely involve political considerations and policymaking on the part of the higher officials within the DRPA.[9]

The policy and political issues, including economic considerations, arising in an entity such as the DRPA are many. If tolls are raised, bridges fall into disrepair, or traffic is congested, there are surely political consequences. Whether decent roads and transit systems will be made available to all segments of the communities, or will be provided in a manner perceived as favoring some or excluding others, raises important and sensitive social, economic and political questions. The fact that the DRPA is composed of membership from two states does not alter or reduce

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9. Judge Nygaard in his dissent argues that the DRPA "is inherently and functionally nonpartisan. That is to say, *its job remains the same* regardless of any shifts in party power." Dissent typescript at 28 (emphasis added). To the contrary, the DRPA's job does not remain the "same," because the DRPA has been delegated extraordinary discretion and a substantial annual budget to achieve its broad goals. This degree of discretion necessarily means that the DRPA's activities can and will vary according to the policy choices made by the higher officials within the DRPA. It therefore is not accurate to say that its job remains the "same." To the extent that its job remains the same, the same could be said of even the highest elective offices in the nation. Yet no one would argue that high elected officials are protected under *Branti-Elrod.*

the likelihood that these matters must be considered and dealt with. Since the governors of New Jersey and Pennsylvania directly appoint fourteen of the sixteen member Board of Commissioners, political responsibillty for the DRPA's successes and failures can be expected to fall on the ruling administration of each state.[10]

The district court noted that the DRPA is not designed to further the political agenda of any one state or administration. But it does not follow from this that party affiliation is not appropriate to the effective performance of the higher positions within the DRPA. For example, if a particular policy would benefit both New Jersey and Pennsylvania, it would be important for those states to have in place officers who agreed with and furthered that policy. Obviously, the party affiliation or policy views of the officers in the DRPA could be relevant to the effective presentation and implementation of particular policy goals. If the states preferred huge increases in spending for the construction of bridges, for example, they might legitimately prefer that high positions in the DRPA not be filled with individuals belonging to a party which advocates decreased government spending.[11]

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10. The dissent states that these consequences "would have no significant impact on the party of an elected political administration." Dissent typescript at 29. We see no basis for the dissent's assertion that elected leaders and ruling parties do not face political responsibility for their actions.

11. The dissent argues that since a majority of the commissioners from each state is required for the DRPA to act, this is "evidence that the DRPA is intended to be insulated from partisan politics." Dissent typescript at 30. This conclusion is suspect. The principle of majority rule, a feature of representative democracy, actually captures and embraces political disagreement. and offers a non-violent means of settling such political disputes. The creators of the DRPA surely recognized that there would be political victors and losers as a result of such votes. The fact that a majority of votes is needed gives a governor even more reason to appoint commissioners who

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Because the DRPA serves at least two different states' interests, it is forced to deal with more than one administration and a complex group of political interests. The DRPA needs officers who are capable of efficiently, effectively and loyally accessing the political channels that influence the DRPA's agenda and direction. The DRPA may choose to retain employees who can be knowledgeable of and be trusted by each state's executive and legislative political infrastructures. Party affiliation can be expected to be an important requirement to effectively carry out these tasks.

The district court also assumed that positions such as Secretary cannot be filled with individuals partial to one of the states, and must be filled by individuals who will always serve the mutual interests of New Jersey and Pennsylvania. But while the DRPA was created to achieve mutually beneficial goals, it did not compel each state to abandon all partisan political considerations and interests. In fact, the New Jersey and Pennsylvania delegations to the DRPA, as would be expected, continue to act as economic competitors.[12] The district court assumed that in governing the

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agree with his philosophy and policies of government. We do not understand how the dissent views the principle of majority rule as evidence that the agency is to be removed from politics or party affiliation.

12. We take judicial notice of newspaper accounts indicating that the New Jersey and Pennsylvania delegations within the DRPA are at times in competition with one another. For example, the Philadelphia Business Journal reported:

> After 10 years without a fare increase, and as the DRPA's monthly subsidies to PATCO, its subsidiary, have snowballed in the last few years, commissioners appeared to reach a consensus that rates will have to rise. . . .

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DRPA, this competition and the likelihood that there will be political differences between New Jersey and Pennsylvania concerning DRPA governance and policies will result in a situation that will minimize any need for the expertise of staff members who are politically sophisticated. We think the court erred in this respect. In fact, either state alone, or both states working together, might choose to accomplish broad economic goals at the DRPA through partisan or bipartisan means. Moreover, because the governor from each state appoints members of the Board, and because the Board in turn elects the positions of Chairman, Vice-Chairman, Secretary, and Treasurer, it can be expected that at various times particular members of the Board and the officers they elect will be partial to one particular state, administration or political party. Indeed, such loyalty among the individual members of the DRPA, in light of political reality, may be appropriate in order for each state to maintain a balance of power within the DRPA. The Compact itself provides that the Secretary and Treasurer "need not be members of the [Board]." Compact art. IV

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> The subject has long been a volatile one, pitting the Pennsylvania and New Jersey delegations against each other, because the line's customers are overwhelmingly New Jersey residents commuting to work in Philadelphia.

David M. Halbfinger, *No Blockbusters From Secret DRPA Meeting*, Philadelphia Bus. J., March 29-April 4, 1993, at 3, 12.

Another article stated that "both [New Jersey and Pennsylvania] have tried to tap the [DRPA's] funds to develop piers, but every attempt has been thwarted by the state that enjoyed a competitive advantage at the shipping docks at the time." Michael Fabey, *DRPA Intends to Exert Its Influence Far From Riverfront*, Philadelphia Bus. J., Sept. 23-29, 1991, at 1, 26.

(d). Thus, the Compact allows, but does not require, the Board to elect their own members (who are political appointments) to act as Secretary and Treasurer. Contrary to the lower court's assumption, the Compact thus specifically considers and allows the possibility that the position of Secretary would be filled by individuals who are loyal to a particular state's governing administration, a particular political party, or to a particular group within the Board. Therefore, party affiliation can be expected to be an important requirement for the effective performance of the higher positions within the DRPA, including that of Secretary.[13]

The fact that the DRPA is composed of more than one state has not removed it from political controversy. While not critical to our holding, we take judicial notice of newspaper accounts highlighting controversies over the DRPA's toll increases,

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13. The dissent argues that because fourteen of the sixteen commissioners serve for five-year terms, while the term of the New Jersey and Pennsylvania governors is four years, this is "compelling evidence of the drafter's intent to keep the DRPA out of patronage and partisan politics." Dissent typescript at 30.

First, we note that since the New Jersey and Pennsylvania governors directly appoint fourteen of the sixteen commissioners, the suggestion that the drafters intended to keep the DRPA out of patronage and partisan politics is not feasible. The fact is that the commissioners are political appointments.

Second, the mere fact that the governors' and the commissioners' positions are not co-terminus is not evidence that the DRPA was meant to be removed from patronage and partisan polltics. Certainly, a one year difference between the four- and five-year terms would not be enough to accomplish the goal of removing the DRPA from politics. This is especially so since the governors may serve two consecutive terms, for a total of eight years. More likely, the drafters of the Compact sought to maintain a small degree of continuity and stability in the DRPA by providing terms for the commissioners slightly longer than that of governor.

spending practices, and public announcements.[14] Those employed by the DRPA must effectively anticipate, avoid, or deal with such political controversies, and party affiliation can be expected to be significant in carrying out these functions.

We reject the proposition that a bi-state entity, by its very nature, mandates that the functions of the offices within the entity

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14. For example, a major newspaper reported the following:

> A series of articles in the Courier Post of Camden questioned the spending practices of the Delaware River Port Authority, which operates four bridges and a high-speed transit line on a budget of $100 million, and spends $3.5 million annually to market the Phlladelphia area ports.
>
> The agency, based in Camden, has offices abroad as well as in Chicago, Houston, Philadelphia, Pittsburgh and New York City. The agency spent $285.000 for foreign and domesic trips since 1987 and 1990.
>
> Reacting to the reports, Governor Florio [of New Jersey] wrote Gov. Robert F. Casey of Pennsylvania last month suggesting a meeting to discuss ways to "insure the fiscal integrity" of the authority.

Peter Kerr, *Battered on Taxes, Florio Warily Considers Higher Tolls*, N.Y. Times, Jan. 5, 1991, at 23-24. *See also* David M. Halbfinger, *No Blockbusters From Secret DRPA Meeting*, Philadelphia Bus. J., March 29-April 4. 1993, at 3, 12 (reporting that the subject of fare increases at the DRPA "has long been a volatile one, pitting the Pennsylvania and New Jersey delegations against each other"); Michael Fabey, *Wilmington Port Is Philly's Partner and Competitor*, Philadelphia Bus. J., Jan. 25-31, 1993, § 2, at 3B (reporting that Wilmington Port, a competitor of the DRPA, criticized the DRPA for misrepresenting to Central Americans that the DRPA handled more bananas than any other port in the country).

be carried out in a non-political manner. The district court cited no authority in the Compact itself, any state or federal legislation, or case law, requiring the DRPA to ignore the reality of partisan political and economic interests in order to achieve its complex and broad goals. The rationale of the district court would hinder and stifle the Board from utilizing high level personnel in a manner which could effectively accomplish its broad-ranging aims and objectives. Nothing in law or political reality suggests that government entities composed of membership from more than one state, including the DRPA, should be prevented from demonstrating that the exception to *Branti-Elrod* protection applies.

We therefore turn to an analysis of the function of the position of Secretary to determine whether it is one for which party affiliation may be an appropriate requirement. Article III, Section D of the By-laws of the DRPA details the duties of the Secretary as follows:

> The secretary, reporting to the Executive Director, shall be the custodian of all records and the seal of the Authority and shall keep accurate minutes of the meetings of the Authority and all of the committees thereof. He shall, on behalf of the Authority certify, when required, copies of records and shall execute legal instruments and documents on behalf of the Authority when ordered to do so, and affix the seal of the Authority to the same, *and shall perform such other duties as may be directed by the Authority.*

App. (92-2101) at 45. (emphasis added). The "other duties" which

the Secretary has been charged with performing are described in the official description of the position of Secretary promulgated by the Board in 1983. App. (92-2101) at 67-70. This document lists, among others, the following duties: reviewing correspondence, reports, communications and sources of information and making appropriate recommendations to the President (Executive Director) of the DRPA; assisting in planning for the improvement and expansion of DRPA facilities, operations, organization and management; participating in high-level DRPA matters with commissioners, committees, operating staff, public officers and other bodies; attending the executive sessions of the DRPA as requested and participating in all policy-forming discussions during executive sessions of the DRPA; acting as liaison and maintaining good public relations with other agencies; assisting the coordination of operational divisions and staff at the DRPA; and interpreting and executing DRPA policy. *Id.* at 67.

The duties described above clearly support the conclusion that the Secretary acts as an advisor or formulates plans for the implementation of broad goals. *See Zold*, 935 F.2d at 635. The official description specifically states that the Secretary is to take part in policy-forming discussions. As noted above, the DRPA is a significant economic entity, with broad powers to design and implement an economic plan for the Port District. The Secretary will take part in policy discussions involving numerous planning and policy issues, and the political consequences of such policies. Party affiliation can be expected to be significant in carrying out these duties. Moreover, party affiliation is unquestionably significant to the Secretary's duties of maintaining good public relations and acting as a liaison with public officials. *E.g., Brown*, 787 F.2d at 170.[15]

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15. In *Zold*, we found that a deputy township clerk who acted as a liaison occupied a position which did not act under the exception to *Branti-Elrod*, 935 F.2d at

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The pre-trial record reflects that the job description of Secretary accurately describes the duties and functions of the job. Peters acknowledged during testimony at his deposition that as Secretary he met with New Jersey State officials and New Jersey State task forces to coordinate actions of the DRPA. App. (92-2101) at 283-85. He also stated that he communicated with state legislators regarding DRPA matters, *id.* at 285, and had contacts with the news media concerning DRPA programs, *id.* at 225-26, 289-90.

In addition to the official job description, other factors reveal that the exception to *Branti-Elrod* applies. When last employed by the DRPA, Peters was earning approximately $57,000 annually. In *Waskovich,* where we held that the exception to *Branti-Elrod* applied to the position of Director of the Division of Veterans' Administrative Services, the Director was earning $64,000 per year. 2 F.3d at 1298. Thus, the amount of Peters' salary is a factor weighing in favor of finding that the exception to *Branti-Elrod* applies.

Peters himself described his duties in his resume. App. (92-2101) at 309-11. He said:

> Responsible for direction and management of total daily operations of an Authority operating four bridges, realizing $100 million in annual revenues and employing a professional and skilled staff of approximately 1,000. Manage

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638, 640. However, the employee in that case, unlike Peters in the instant action, was not officially assigned the duty of acting as liaison and did not promote policies of the organization. *Id.* at 638.

> an annual budget of $50 million. Promoted the ports of the Delaware Valley while supervising daily activities of the Budget, Economic Development, and Port Operations, Bridges, Public Relations, Personnel, Security, and Engineering departments.

Id. at 309. While the actual duties performed by officeholders are not determinative, they are informative. *Waskovich,* 2 F.3d at 1300. We have indicated that preparing budgets and promoting projects are duties which count in favor of finding that the exception to *Branti-Elrod* applies. *Id.* at 1297; *Brown,* 787 F.2d at 169-70. The actual duties described by Peters himself include promoting projects and managing a budget, thus supporting a finding that the office of Secretary is one which falls under the exception to *Branti-Elrod.*

Also instructive to our determination is a document authored by Peters while Secretary in which he analyzed the DRPA's organizational structure and recommended significant changes. App. (92-2101) at 312-51. This document indicates that Peters acted as an advisor of broad goals. Moreover, a former Secretary of the DRPA, Steven Joachim, attested that, consistent with the job description of Secretary, he was assigned sensitive and important responsibilities on a variety of important policy matters. *Id.* at 491-92.

In light of the uncontested facts before us, we find that, as a matter of law, the duties inherent in the position of Secretary are such that party affiliation is an appropriate requirement for the effective performance of that position.[16] The district court therefore

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16. In light of our holding, it is unnecessary for us to address the numerous (Cont'd)

erred in denying the DRPA's motion for summary judgment.

IV.

For the foregoing reasons, we will reverse the judgment of the district court entered on January 8, 1993, and remand the case to the district court with a direction to enter judgment for the defendant.

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evidentiary objections or the excessive damages issue which the DRPA raised in this appeal, nor to address its motion for a new trial.

The DRPA also appeals the denial of its motion for leave to assert a counterclaim against Peters. The district court determined that the motion for leave to assert a counterclaim was untimely. We find no abuse of discretion in that determination, and will affirm the denial of leave to assert the counterclaim.

Appendix C

NYGAARD, *Circuit Judge*, concurring and dissenting:

I join in parts I-III(A) of the majority opinion. I respectfully dissent because I believe the district court correctly concluded that the exception to the *Elrod-Branti-Rutan* doctrine was both inapplicable to the DRPA and unwarranted by these facts.

I.

It is well to first place the issue in perspective and note just what this case is all about. It is about a political party's power to command membership or some pledge of allegiance to the party as a requirement for public employment. It is about Walter T. Peters' constitutional right secured by the First and Fourteenth Amendments to affiliate with the political party of his choice without fear that he will lose his livelihood as a result. I begin with the law as set forth by the Supreme Court. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), a majority of the Court annunciated a "positional" test and held that public employees' political affiliation enjoyed constitutional protection and one could not be dismissed on the basis of party affiliation unless one held a "policymaking" position. *See id.* at 367, 96 S. Ct. at 2687 (plurality op.); *id.* at 374-75, 96 S. Ct. at 2690 (Stewart, J., concurring). Writing for the plurality, Justice Brennan pointed out that political affiliation is protected by the First Amendment; accordingly, for a political patronage dismissal to be justified, the governmental body must demonstrate that it possesses an overriding (not merely legitimate) reason before encroaching on the employee's constitutional rights. Moreover, the interest of the government must not be confused with that of a political party; the interest asserted must belong to the government in its governmental role. And finally, the infringement of protected

rights must be the least restrictive one possible. *Id.* at 362-63, 96 S. Ct. at 2684-85.[17]

Thus, the plurality held that merely because an employee belongs to a different political party than the one currently in majority status does not support the inference that he or she will undermine governmental effectiveness and can be dismissed solely on partisan grounds, noting that an ineffective or insubordinate employee may be fired *for good cause. Id.* at 365-66, 96 S. Ct. at 2685-86. The plurality instead carved out a very narrow exception for policymaking *positions. Id.* at 367, 96 S. Ct. at 2687. It acknowledged that the line between policymaking and nonpolicymaking positions is difficult to draw and placed the burden of proving the policymaking nature of the jeopardized position on the government.

Four years later, in *Branti v. Finkel,* 445 U.S. 507, 100 S. Ct. 1287 (1980), a clear majority of the Court refined and tightened the exception recognized by the *Elrod* plurality by adding a "personal" overlay. First, the Court stated that only if an *employee's* political beliefs would (not "could") interfere with the performance of his or her duties, could an employee's constitutional rights could be overridden and the employee dismissed for political reasons. *Id.* at 517, 100 S. Ct. at 1294. Second, the Court re-examined the *Elrod* "positional" test and determined that "party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* at 518, 100 S. Ct. at 1295. It then recast the *Elrod* test as follows:

> [T]he ultimate inquiry is not whether the label

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17. This principle was reaffirmed by a majority of the court in *Rutan v. Republican Party of Illinois,* 110 S. Ct. 2729, 2736 (1990).

> "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Id. The Court then held that an assistant public defender could not be dismissed because of his or her political beliefs. Although the job of a public defender might well entail policymaking and would certainly involve confidential information, both factors concerned only representing criminal defendants, and had no impact on the governmental process. *Id.* at 519, 100 S. Ct. at 1295.

We too have given close scrutiny to any contention that a position was subject to political dismissal. In three cases we further defined the *Elrod-Branti* burden and set forth a standard that only when a difference in political affiliation is "highly likely" to make the employee ineffective, may a politically motivated dismissal may pass constitutional muster. *Waskovich v. Morgano,* 2 F.3d 1292, 1297 (3d Cir. 1993); *Zold v. Township of Mantua,* 935 F.2d 633, 635 (3d Cir. 1991); *Ness v. Marshall,* 660 F.2d 517, 521 (3d Cir. 1981). The majority dismisses this standard as essentially mere dictum (maj. op. at 13). I disagree.

The majority is correct, so far as it goes, that in *Ness,* we did not explicitly hold that "highly likely" was the burden to be met in all cases. We did, however, repeat this formulation of the standard in both *Zold* and *Waskovich.* Moreover, in *Waskovich* we noted that the exception for political dismissals is narrow one. 2 F.3d at 1297 (citing *Burns v. County of Cambria*, 971 F.2d 1015, 1023 (3d Cir. 1992)). This alone counsels against the majority's expansion of the *Elrod-Branti* exception.

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More importantly, I think the majority incorrectly cramps the scope of Peters' First Amendment rights. In *Zold*, we cited *Elrod* for the proposition that the govemment must demonstrate an "overriding interest" to justify an exception to the general rule forbidding a politically motivated dismissal. 935 F.2d at 635. This discussion took place in the same paragraph in which we cited the *Ness* "highly likely" standard. The majority fails to recognize what was implicit in *Zold* and is obvious in any event: if a political difference is not highly likely to render this employee ineffective in his or her assigned duties, the government interest in a politically motivated dismissal cannot possibly override his or her constitutional rights.

Properly viewed, then, the *Elrod-Branti* exception for policymaking positions is just that — an exception — sparingly granted and narrowly construed to cover situations in which a governmental decisionmaker or body, accountable to a political party and whose power is delegated to it by the people, has the legitimate expectation that a specific key employee both shares with it the same viewpoint mandated by a ballot to the dominant party, and moreover, will effectuate governmental policies accordingly. Applying the test to *Ness*, we concluded that a city solicitor who reported to the mayor could be dismissed for partisan political reasons. 660 F.2d at 521. The solicitor was an expert on whom the mayor relied to render opinions, draft ordinances and negotiate contracts. We stated that the mayor who is, after all, a party's nominee and elected by partisan ballot, "has the right to receive the complete cooperation and loyalty of a trusted adviser, and should not be expected to settle for less." *Id.* at 522.

This brings me to the particulars of this case. While undoubtedly the DRPA, like any governmental agency or business, has a need for a loyal confidant in the position of Secretary, this

need cannot come within the *Elrod-Branti* exception unless the loyalty is not merely to the position, but is necessarily to a partisan political interest. *See Burns*, 971 F.2d at 1022 (citing *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc) ("A threshold inquiry, which derives from *Branti* involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to partisan political concerns. . . . Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?" (citations and internal quotations omitted)). The majority strives mightily to demonstrate how the structure, organization and functions of the DRPA relate to a political party's interest. It is unable, however, to refute the reasoning of the district court that, although the DRPA no doubt has "broad powers" (as do many government agencies and businesses), it is inherently and functionally nonpartisan. That is to say, its job remains the same regardless of any shifts in party power.

First, the majority notes that there is "room for principled disagreement on policy goals or their implementation." (Maj. op. at 15). Of that I have no doubt; yet, the same would be true of a doctor in a government hospital or a football coach at a state university. Without a nexus to partisan processes, however, this fact is quite irrelevant. *See Branti*, 445 U.S. at 518, 100 S. Ct. at 1295.

Second, the majority points to the possibility of political consequences stemming from the success or failure of DRPA policies. This is also true — and equally irrelevant to the analysis. What the majority fails to recognize is that those consequences would have no significant impact on the party of an elected political administration. Assume for example, that Peters somehow subverted for political ends the bridge maintenance

plans of the DRPA, causing traffic delays and resulting in irate commuters. No doubt this subversion would make the DRPA an unpopular entity, but no more so than if a local road supervisor failed to repair potholes in the road. Both could be fired for cause, but the political affiliation of neither is material. I conclude the partisan processes are simply too removed from the affairs of the DRPA for Peters' party affiliation to adversely affect its government processes.

Third, the majority argues that, *because* of the bi-state nature of the DRPA and its need to interact with the elected officials of both states, its staff members must be "politically sophisticated" (maj. op. at 17-18). That fact, however, does not by itself create a nexus with *partisan* political concerns, viz., concerns that relate directly to the success or failure of the party's policy agenda. Many positions in government and business require the ability to deal with and lobby political bodies and officials of both parties. "Political sophistication," quite simply, is not the test enunciated by *Elrod* and *Branti*.

Fourth, the majority asserts that "political reality" dictates that political affiliation is relevant to maintain the balance of power on the DRPA between New Jersey and Pennsylvania (maj. op. at 17-19). Specifically, the majority regards the fact that the positions of Secretary and Treasurer may be filled by DRPA commissioners as some evidence that party loyalty and affiliation was considered relevant to those positions by the drafters of the DRPA Compact. I disagree. If anything, I think the requirements of the Compact show quite the opposite. The Compact requires that the Chairman and Vice-Chairman of the DRPA be sitting commissioners, while the Secretary and Treasurer need not be. That requirement is strong evidence of which positions the drafters thought were partisan. Because the Compact permits the latter two

positions to be filled by non-commissioners, it follows that party loyalty is simply not relevant to the duties of the Secretary and Treasurer. "Political reality" is only a euphemism for the functionally illegitimate practice of rewarding the party faithful and is hence "at war with the deeper traditions of democracy embodied in the First Amendment." *Elrod*, 427 U.S. at 357, 96 S.Ct. at 2682 (citing *Illinois State Employees Union v. Lewis*, 473 F.2d at 561, 576 (7th Cir. 1972)). It has no business in the equation by which we counterbalance a constitutionally protected interest.

Additionally, I note that the commissioners, with the exception of the two *ex officio* members from Pennsylvania, serve for five-year terms, while the term of the New Jersey and Pennsylvania governors is four years. Had the drafters of the Compact considered political affiliation and responsiveness to partisan politics in both states to be essential to the governance of the DRPA, it follows that the commissioners would have been given four-year terms. If anything, then, these five-year terms are compelling evidence of the drafter's intent to keep the DRPA out of patronage and partisan politics.

Moreover, that a majority of the commissioners from each state is required for the DRPA to act is also evidence that the DRPA is intended to be insulated from partisan politics. For example, assume New Jersey's Republican governor appoints eight Republicans to the DRPA, while Pennsylvania's Democratic governor appoints six Democrats. Assume further that the Pennsylvania State Treasurer and Auditor General are both Republicans. Republicans would then hold a 10-6 majority on the DRPA. Yet, if the six Pennsylvania Democrats held together in opposition to a plan put forth by all the Republicans, the plan could not be implemented by the DRPA. If the DRPA were intended to be responsive to partisan political pressures, one would not find such a provision in its Compact.

Appendix C

I have no doubt that the DRPA, regardless of design, is not apolitical. It responds to the governmental interests of the State of New Jersey and the Commonwealth of Pennsylvania. That, however, is not a *partisan* political concern. Simply stated, it cannot be said that party affiliation is a *requirement* for efficient performance of Peters' duties, which is the minimum the *Elrod-Branti* line of cases require if he is to be subject to political dismissal. I would therefore affirm. I believe the majority has misconstrued the rationale and purpose behind the political dismissal doctrine and has broadened the exception to the point that it endangers the rule. Walter T. Peters was fired because of his political beliefs and party affiliation, and from a position where neither mattered. I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED AUGUST 13, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

MEMORANDUM

Bartle, J. August 13, 1993

Plaintiff, Walter T. Peters, Jr., instituted this action against the Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") pursuant to 42 U.S.C. § 1983. Plaintiff had served as Secretary of the DRPA between October 20, 1989 and January 16, 1991. Plaintiff claimed that the DRPA violated his constitutional right of freedom of belief and association by failing to reelect him as its Secretary at the end of his term because he is a member of the New Jersey Republican Party. This case was tried before a jury which found for the plaintiff and awarded him damages of $125,000. Before the court is plaintiff's motion for attorney's fees in the amount of $188,623 and costs in the amount of $8,298.74 pursuant to 42 U.S.C. § 1988.

Appendix D

Section 1988(b) provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" for actions brought under 42 U.S.C. § 1983 and other federal civil rights statutes. Under this statute, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprise, Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968). No such "special circumstances" arise in this case. Plaintiff is clearly a prevailing party because he won a verdict against the DRPA at trial. *Texas State Teacher Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1493 (1989); *Cerva v. E.B.R. Enterprises, Inc.*, 740 F. Supp. 1099, 1103 (E.D. Pa. 1990).

The basic fee award, known as the "lodestar," is computed by multiplying the reasonable hourly rate by the number of hours worked. *Hensley v. Eckerhart*, 461 U.S. 424, 443, 103 S. Ct. 1933, 1944 (1983). A reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 1547 (1984). Defendant has not objected to the basic ourly rates reguested by plaintiff's attorneys, and this court inds those rates to be fair and reasonable. However, defendant challenges various fee multipliers requested by plaintiff and sserts that plaintiff should not recover fees for time spent on ertain unsuccessful or unrelated claims.

Plaintiff's petition requests a contingency multiplier 200% to compensate counsel for the risk of total non-payment had plaintiff been unsuccessful, and to insure that civil rights plaintiffs can retain competent counsel. In *City of Burlington v. Dague*, __ U.S. __ 112 S. Ct. 2638 (1992) the Supreme Court held, in the context of the Solid Waste Disposal Act (SWDA) and the Clean Water Act (CWA), that contingency multipliers are not permitted. The court's

analysis is equally applicable to § 1988 claims. The language of the various fee-shifting statutes is virtually identical.[1] The *Burlington* court stated that the case law construing what is a "reasonable" fee applies uniformly to all of the many federal fee-shifting statutes. *Id.* at 2693. Accordingly, this court will not apply a contingency multiplier to the lodestar amount.

Plaintiff has also requested that the court award an enhancement to the lodestar based on the superior quality of representation. This type of enhancement, known as a "quality multiplier," is permitted only in the rare case where the quality of work "is so superior and outstanding that it far exceeds the expectations of clients and normal levels of competence." *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories,* 842 F.2d 1436, 1453 (3d Cir. 1988). Quality of representation ordinarily should not be used to enhance the lodestar because an attorney's skill is normally reflected in the hourly rate. Moreover, the complexity of the case is generally addressed by the number of hours billed. The use of a quality multiplier may therefore lead to the danger of "double counting." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 106 S. Ct. 3088, 3098 (1986) (Delaware Valley I). Consequently, the fee applicant must also establish that the basic lodestar amount is insufficient to provide a reasonable fee reflective of the quality of representation. *Id.* 106 S. Ct. at 3099. In the present case while the caliber of representation was high, it was not that rare situation where an enhancement is justified. The lodestar adequately reflects the skill of the attorneys and the complexity of the litigation.

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1. 42 U.S.C. § 6972(e) of the SWDA and 33 U.S.C. § 1365(d) of the CWA authorize a court to "award costs of litigation (including reasonable attorney . . . fees) to a prevailing or substantially prevailing party."

Appendix D

Plaintiff's petition also requests an adjustment to the lodestar to account for the cost of delay in receiving payment. Delay in payment may be an appropriate reason for increasing a fee award. *Student Public Int. Res. Group v. AT&T Bell Laboratories,* 842 F.2d 1436, 1453 (3d Cir. 1988); *Institutionalized Juveniles v. Sec. of Pub. Wel.,* 758 F.2d 897, 922 (3d Cir. 1985). The decision to award a delay multiplier and the amount of that award are matters within the discretion of the district court. *Id.* A delay multiplier is not automatically necessary to provide a reasonable compensation. Delay between the rendering of services and the receipt of payment is not uncommon throughout the profession. Attorneys generally receive no adjustment whatsoever for late payment, whether they are compensated hourly or on a contingent basis. Few attorneys, regardless of how they bill clients, recover a market rate of interest for the late payment of fees. *Institutionalized Juveniles,* 758 F.2d at 923. Furthermore, this is not an old case. Plaintiff's counsel's earliest billing entries date back to February of 1991. The complaint was filed in September of 1991. Given the relatively short duration of the litigation, this court finds that a delay multiplier is not necessary to compensate adequately plaintiff's counsel.

Even were the court inclined to adjust the award to account for the delay in this case, plaintiff has failed to sufficiently document its costs in receiving late payment. The Court of Appeals for this circuit has made it clear that plaintiff must present "carefully developed evidence" of the need for a delay multiplier and the costs of receiving the delayed payment. *Institutionalized Juveniles,* 758 F.2d at 923-24. A bare request unaccompanied by such evidence is insufficient. *Keenan v. City of Philadelphia,* 983 F.2d 459, 476-477 (3d Cir. 1992); *Student Public Int. Res. Group,* 842 F.2d at 1453. Plaintiff in this case did not provide evidence of the costs his counsel incurred because of delay in payment. Instead

plaintiff merely requests that the court award interest from the time plaintiff filed his complaint until the present and suggests that the court calculate the interest using the prime rates for the relevant time. Plaintiff has not calculated the amount of fees attributable to each year for which interest is requested. For this additional reason, plaintiff's request for a delay multiplier will be denied.

Defendant contends that the court should disallow fees incurred in connection with certain claims which were either unsuccessful or unrelated to the first amendment claim. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983), the Supreme Court held that no fees may be recovered for unsuccessful claims which were based on distinctly different facts and legal theories from those claims on which plaintiff prevailed. However, where claims are factually or legally related, it is difficult to determine precisely which hours were devoted to which claims. In those circumstances the Court explained that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* 103 S. Ct. at 1940. Furthermore, where a litigant raises alternate legal grounds for a desired outcome, the court's rejection or failure to reach certain grounds does not require a reduction in the award. *Id.* The task of the court in considering a request for fees is to determine what is a reasonable amount. To that end, the court considers "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

In this case, defendant asserts that the court should exclude hours spent by plaintiff's attorneys in assisting plaintiff in applying for unemployment compensation benefits. Specifically, defendant contests .8 hours spent representing plaintiff at a hearing for such benefits. Plaintiff concedes that the inclusion of this entry was error. This time was billed at $120.00 per hour. The court will therefore deduct $120.00 from the award.

Appendix D

Defendant also challenges two other entries involving work related to the unemployment benefits. These are as follows:

> 9/21/92 LDJ 7.20 Hours
> Conducted Legal Research Re: Damages Plaintiff is Entitled To Under 42 1983; Conducted Legal Research Re: Collateral Estoppel Effect of Administrative Rulings;
>
> * * *
>
> 10/14/92 PKJ 5.50 Hours
> Attention To File; Reviewed Unemployment Compensation Hearing Tapes; Legal Research Re: Rule 611; Review Strategy For Rule 11 Motion and Motion for Partial Summary Judgment;

Although these entries refer in part to the unemployment benefits proceedings, for which plaintiff is not seeking fees, the work reflected in the entries was related to the First Amendment claim under 42 U.S.C. § 1983. Research concerning whether the various administrative rulings would have a collateral estoppel effect on the identical issues in the district court was certainly related and reasonable. It was also reasonable for plaintiff's attorneys to review the tapes of the administrative hearings as the plaintiff testified at those hearings. The challenged entries will therefore not be excluded from the calculation of fees.

Defendant also asks that the court exclude time which plaintiff's attorneys expended in connection with his due process claim. Plaintiff had alleged that the failure of DRPA to reelect him to his position as secretary violated his due process rights. This

court did not submit that claim to the jury. In order to prevail on the due process claim, plaintiff would have had to prove that he had a property interest in the form of a reasonable expectation of continued employment. *Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986). Because the due process claim was legally and factually distinct from the First Amendment claim, the court will deduct from the award, to the extent possible, hours spent exclusively in pursuit of it. I find that plaintiff's attorneys expended 9.3 hours at a rate of $150.00 per hour and 11.6 hours at a rate of $200.00 per hour, on the due process claim.[2] Thus the court will deduct $3,715.00 from the total amount of the award.

Defendant has also requested that the court deduct 9.8 hours from the award for time plaintiff's attorneys spent opposing unsuccessfully defendant's motion to set aside an order dismissing defendant's appeal for want of prosecution. The Court declines to do so. *Hensley* does not require that the court deduct fees for every motion on which plaintiff is not successful. So long as plaintiff is the prevailing party, all time reasonably spent in pursuit of that victory is compensable. I find that the time spent opposing defendant's motion was not excessive and will therefore not be excluded.

Defendant objects to plaintiff's reguest for costs, as not sufficiently documented. It is true that a fee applicant must adequately document expenses. *In Re San Juan DuPont Plaza Hotel Fire litigation*, 142 F.R.D. 41, 46 (D. P.R. 1992). Plaintiff has done so in this case. Plaintiff's client billing worksheet contains a complete list of expenses. Although the worksheet itself is

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2. The court finds that the following billing entries related in the most part to the due process claim: 2.3 hours on 11/2/92; 4.6 hours on 12/15/92; 2.5 hours on 12/18/92; 7 hours on 12/19/92; and 4.5 hours on 12/23/92.

unsworn, plaintiff has provided a sworn affidavit attesting to its accuracy. I find that the documentation is sufficient to warrant an award of costs and that the amount claimed is reasonable.

Finally, defendant reguests that the court reduce the award for time spent in connection with the fee petition by 75% to reflect the fact that plaintiff will not be wholly successful in recovering the requested fees. Time spent on the fee petition is to be analyzed separately from the time spent on the litigation itself. *Hensley,* 103 S. Ct. at 1933. Courts are required to reduce the award to reflect the degree of success in recovering fees. *Student Public Int. Res. Group*, 842 F.2d at 1455; *Cerva E.B.R. Enterprises, Inc.*, 740 F. Supp at 1108. Plaintiff's attorneys have expended approximately of 46.6 hours on the fee petition, amounting to a total of $7,353.00.[3] In determining the correct amount by which to reduce the award it is unnecessary, not to mention impossible, for the court to attempt to determine the exact number of hours spent on the fee petition related to the excluded claims. *See Fletcher v. O'Donnell,* 729 F. Supp. 422, 434 (E.D. Pa. 1990). The court's task, here, is to determine a reasonable award. Therefore, I find that in light of the fact that plaintiff has not obtained any of the requested fee multipliers but has been otherwise successful on the majority of the fee petition, a reduction of 20% of the total value of the hours devoted to the fee petition is reasonable. Plaintiff's total award will be reduced by $1,470.60.

In conclusion, plaintiff shall be awarded attorney fees in the amount of $183,317.40 and costs in the amount of $8,298.74.

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3. Although defendants have characterized this amount as "inordinate," they have not contested the reasonableness of the hours expended on it, other than by requesting the reduction for partial success.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

ORDER

AND NOW, this 13th day of August, 1993, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the defendant, Delaware River Port Authority of Pennsylvania and New Jersey, shall pay plaintiff, Walter T. Peters, Jr., for attorney fees in the amount of $183,317.40 and costs in the amount of $8,298.74.

BY THE COURT:
s/ Harvey Bartle, III
J.

APPENDIX E — MEMORANDUM OPINIONAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 9, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF
PENNSYLVANIA AND NEW JERSEY

MEMORANDUM

Bartle, J. March 9, 1993

Plaintiff Walter T. Peters, Jr. ("Peters") instituted this civil rights action pursuant to 42 U.S.C. § 1983.[1] Plaintiff alleges that the defendant, Delaware River Port Authority of Pennsylvania and

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1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

New Jersey ("DRPA"), infringed his constitutional rights of freedom of belief and association, by failing to reelect him as its Secretary because he was a member of the New Jersey Republican Party. The case proceeded to trial before a jury which returned a verdict in favor of Peters. The jury found that the decision of the DRPA not to reelect him was based substantially on his political affiliation and awarded him damages in the amount of $125,000.

DRPA has now moved for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure[2] or, in the alternative, for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. Judgment as a matter of law is appropriate only where the Court finds that "the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir. 1987), cert. denied, 484 U.S. 853 (1987) (citations omitted). In making this determination, the court must view the evidence in the light most favorable to the non-moving party and may not weigh evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. *Id.*

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2. Rule 50(b) provides in pertinent part that:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trail under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. . . .

Appendix E

The DRPA is an agency of Pennsylvania and New Jersey, formed by Compact (the "Compact") between these two states. The Compact, approved by Congress in 1931,[3] was created, among other things, to operate and maintain the bridges owned jointly by Pennsylvania and New Jersey across the Delaware River and between the cities of Philadelphia and Camden. Under the Compact, DRPA has the authority to construct and maintain facilities for the transportation of passengers, to improve and develop the Port District for port purposes, and to promote commerce on the Delaware River. It may also establish, maintain, and operate a rapid transit system between certain ports in New Jersey and Pennsylvania (Compact, Art. I). 36 Pa. Cons. Stat. Ann. § 3503; N.J. Stat. Ann. § 32:3-1 et seq.

The DRPA is governed by a sixteen member Board of Commissioners, eight of whom are appointed by the Governor of New Jersey for periods of five years. The Governor of Pennsylvania appoints six of the Commissioners for five year terms, with the elected Auditor General and the elected State Treasurer of Pennsylvania filling the remaining two positions for their four year terms. All Commissioners, other than the Pennsylvania Auditor General and State Treasurer, continue to hold office after the expiration of their terms and until their successors are appointed and qualified (Compact, Art. II). The Board of Commissioners is empowered to elect various officers including a Secretary and Treasurer (Compact, Art. IV). The Bylaws of the DRPA further provide that the Board is to elect the Secretary for a two year term. All actions taken by the DRPA must be approved by a majority of the representatives from each state.

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3. Art. I, § 10, cl. 3 of the Constitution provides:

> No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.

Appendix E

Peters became an officer of the DRPA when the Board of Commissioners elected him as Secretary on October 20, 1989 to fill a vacancy. However, the Board did not reelect him when his term ended on January 20, 1991. Peters, a New Jersey Republican, claimed that he was not retained because the Commissioners wanted the position for an individual affiliated with the New Jersey Democratic Party. Defendant argues that plaintiff failed to meet its burden of proof at trial, and failed to establish that any deprivation of plaintiff's rights constituted a "custom or policy" of the DRPA.

The Supreme Court has held that it is generally a violation of the First Amendment right of freedom of belief and association for a public employer to fire, fail to promote, or fail to reappoint an employee on the basis of political affiliation. *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673 (1976); *Branti v. Finkel,* 445 U.S. 507, 100 S. Ct. 1287 (1980); *Rutan v. Republican Party of Illinois,* 41 U.S. 62, 110 S. Ct. 2729 (1990). The Court has carved out an exception to this general rule where "the hiring party can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 100 S. Ct. at 1287. However, in its decision of December 11, 1992, this Court determined, as a matter of law, that the party affiliation was not an appropriate requirement for the position of Secretary of the DRPA.

The Court charged the jury, without objection, that the actions taken by the Board of Commissioners constitute the official policy of the DRPA for 1983 purposes. Although under *Monell v. N.Y. City Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 2036 (1978), municipal liability under S 1983 is limited to acts taken pursuant to "official municipal policy . . . ," the Supreme Court in *Pembaur v. Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 1298 (1985) explained that a single act may constitute the official policy of the municipality if taken by those officials who have final decision

making authority for the governmental entity. Here, it is undisputed that the Commissioners of the DRPA have ultimate policy making authority as to the election of its officers.

Thus, plaintiff's burden at trial was limited to establishing that his political affiliation was a substantial or motivating factor in the decision of the DRPA not to reelect him. *Mt. Healthy Board of Ed. v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 576 (1976). The burden then shifted to defendant to show that the Commissioners would not have reelected him even if his political affiliation had not been considered. *Id.*

Defendant's contention that plaintiff has failed to produce sufficient evidence to meet his burden is without merit. Plaintiff provided both direct and circumstantial evidence that the DRPA was motivated by his political affiliation. While the Court will not now recount in detail all the evidence presented during the six days of trial, some highlights are noteworthy. Peters testified that various Commissioners admitted to him that the decision not to reelect him was "political" in nature.[4] Furthermore, Commissioner Jamieson, a Pennsylvania Commissioner, testified for plaintiff that the reason plaintiff was not reelected was because "he had a Republican background and it was the Democrats' turn, and they took their turn." (T.T. 12/30/92, p. 52). Although each of the other Commissioners who testified for defendant stated that politics did not influence his or her decision, the jury apparently disbelieved them. It is not this Court's function to weigh the evidence in

4. Plaintiff testified that, among others, Commissioner Moon said that he "should understand politics . . . . " (T.T. 12/28/92, pp. 102-103); Commissioner Kennedy told him that he should understand the decision "because I had been in politics and I knew what politics was all about." (T.T. 12/28/92, p. 103); Commissioner Direnzo told him that he "should know what politics are and don't worry about it . . . ." (T.T. 12/28/92, p. 106).

deciding a Rule 50 motion. Questions of credibility are the province of the jury.

The historical background leading up to the election provided further support for plaintiff's position. Peters produced evidence of a "gentlemen's agreement" entered into in late 1989, by the then Governors of New Jersey and Pennsylvania. The agreement provided that certain positions were to be divided between the two states, as they became vacant. (T.T. 1/4/93, p. 135, Testimony of Commissioner Stewart). The New Jersey Commissioners had "control" of the Secretary's position. (T.T. 12/30/92, p. 113). Commissioner Burke of New Jersey and others testified that Pennsylvania would go along with New Jersey's choices for the positions which New Jersey controlled. (*See* T.T. 12/30/92, p. 252; T.T. 1/4/93, p. 48). There was further testimony that although the "gentlemen's agreement" was not in the Bylaws of the DRPA, it was common knowledge among the Commissioners. (T.T. 1/4/93, p. 124).

In November of 1989, James Florio, a Democrat, was elected Governor of New Jersey. Commissioner Burke, a Democrat and then Vice Chairman of DRPA, testified that he made the decision not to renominate plaintiff after discussions with members of Governor Florio's staff. (T.T. 12/30/92, p. 117). The jurors could reasonably infer from this sequence of events, combined with the other evidence, that the decision not to reelect plaintiff was based on the desire of the New Jersey Governor and of the New Jersey Commissioners to fill a position which they "controlled" with someone from the Democratic party. The person elected as Secretary to succeed Peters was active within the New Jersey Democratic Party and was personally acquainted with the Governor of New Jersey and his Chief of Staff. (T.T. 12/28/92, p. 93; T.T. 12/30/92, pp. 58-59).

Finally, the jury is entitled to infer an unconstitutional motive if the plaintiff presents sufficient evidence for a jury to find that the reasons asserted by defendant for its conduct were not its actual reasons. *Roebuck v. Drexel University*, 852 F.2d 715, 731 (3d Cir. 1988). Here Peters provided ample evidence from which a jury could find that defendant's stated reasons for failing to reelect him were merely pretexts. His evidence established that he performed his duties well, that the Commissioners were more than satisfied with his work, and that they voted to grant him the highest percentage merit raise in salary of all employees. (T.T. 12/28/92, p. 53). While defendant presented evidence to the contrary, the jury clearly did not find it persuasive.

Defendant contends that plaintiff was required but failed to prove that at least five Commissioners from each state were motivated by Peters' political affiliation in failing to reelect him. Assuming that defendant's formulation of plaintiff's burden is correct, we find that Peters produced sufficient evidence to satisfy it. Peters testified that Commissioner DeSeve, a Pennsylvania Commissioner, told him that "New Jersey wanted him out" and explained that New Jersey meant the New Jersey Commissioners. (T.T. 12/28/92, pp. 105-106). Commissioner Jamieson, a Pennsylvanian, testified that plaintiff was not reelected because he was a Republican, "and the Democrats wanted their turn, and they took their turn." (T.T. 12/30/92, p. 52). From this testimony, the jury could infer that a majority of the New Jersey Commissioners were motivated by his political affiliation. Furthermore, plaintiff produced evidence that Pennsylvania, acting in accordance with the gentlemen's agreement, knew of and acquiesced in New Jersey's actions. From this, and other evidence presented in the case, the jury could find that a majority of the Pennsylvania Commissioners acted with a political motive as well.

Appendix E

Plaintiff has produced sufficient evidence from which a jury could conclude that the decision not to reelect him was motivated by his political affiliation. Defendant's Rule 50 motion will be denied.

In addition to its motion for judgment as a matter of law, defendant moves for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. It asserts that errors were made by the Court during trial and that the verdict was against the great weight of the evidence. Rule 59(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

A new trial is appropriate where the jury's verdict is against the great weight of the evidence or where errors at trial have meant that substantial justice was not accomplished. *Roebuck v. Drexel University,* 852 F.2d 715 (3d Cir. 1988). The mere existence of error is not sufficient to warrant the granting of a new trial. As stated in Rule 61 of the Federal Rules of Civil Procedure,[5] the error

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5. Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

must have been so prejudicial that refusal to grant the motion "appears to the court inconsistent with substantial justice." *See also Bhaya v. Westinghouse Elec. Corp.*, 709 F. Supp. 600, 601 (E.D. Pa. 1989), *aff'd* 922 F.2d 184 (3d Cir. 1990).

The Court rejects the defendant's claim that the verdict was against the great weight of the evidence. Although the standard for granting a new trial is less stringent than for judgment as a matter of law, we hold, after a review of the record, that the plaintiff has presented sufficient evidence for a jury to find in his favor on all issues raised by the defendant.

Similarly, defendant's assertion of numerous errors at trial are without merit. Only one claim requires any discussion.

In its brief defendant stresses that the Court erred in admitting "double hearsay." Peters testified to statements made to him by several Commissioners. The Court allowed this evidence as admissions under Rule 801(d)(2)(D) of the Federal Rules of Civil Evidence.[6] Defendant contends that some of these statements constituted impermissible double hearsay because Peters was permitted to testify to what certain Commissioners told him about what other Commissioners had said. Double hearsay is not per se inadmissible but may be admitted pursuant to Rule 805 of the Federal Rules of Evidence, which provides:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of

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6. Fed.R.Evid. 801(d)(2)(D) provides, in relevant part, that an out of court statement is not hearsay if:

> [t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment . . .

> the combined statements conforms with an exception to the hearsay rule provided in these rules.

Defendant contends that the requirements of Rule 805 are not satisfied in this case because the identities and positions of the persons who spoke with the Commissioners who talked to Peters were not revealed. Defendant relies for this proposition on *Carden v. Westinghouse Electric Corporation,* 850 F.2d 996 (3d Cir. 1988). In *Carden,* an age discrimination case, the plaintiff testified that when asked about the reason for his discharge, his supervisor told him that "he thought they wanted a younger person for the job." *Id.* at 998. The Court held that the admission of this statement was error because "they" were not identified. Thus, while the statement of plaintiff's supervisor would be admissible as an admission, there was no independent basis for admitting the comment of the "they." The Court further found that the comment "they" had made was "essential" for the plaintiff to prove his case.

Upon reviewing the record, the Court finds only two statements which raise a possible double hearsay problem. First, Peters testified that he asked Commissioner Jamieson to find out why he was not going to be reelected. According to Peters, Commissioner Jamieson "said he would do it in caucus. And after caucus he came to me and Mr. Jamieson said that he had been assured it had nothing to do with my work, my behavior or anything else, it was strictly political in nature." (T.T. 12/28/92, p. 105). Defendant contends that this statement is impermissible because the "caucus" is not sufficiently identified. We disagree. Unlike in *Carden* where "they" were not identified anywhere in the record, Peters testified that the "caucus" was a meeting which the Commissioners held in order to discuss the agendas of the upcoming public meetings. (T.T. 12/28/92, pp. 81-82). Thus, the

"caucus" referred to other Commissioners. What Commissioner Jamieson told Peters about his own views is admissible as an admission of DRPA under Rule 801(d)(2)(D) and what Commissioner Jamieson told Peters about what other Commissioners said is likewise admissible as an admission of DRPA.

The second statement which defendant asserts is impermissible double hearsay is plaintiff's testimony that Commissioner DeSeve told him that "... as far as he was concerned I could have stayed there forever, but New Jersey wanted me out." (T.T. 12/28/92 pp. 105-106). Peters went on to testify that "New Jersey" referred to the New Jersey Commissioners. *Id.* Therefore, this statement, like the previous one, was properly admissible as an admission of the Commissioners. Furthermore, unlike the statement in *Carden*, these contested statements by themselves were not "essential" to plaintiff's case.[7]

The motion of defendant for a new trial will likewise be denied.

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7. Defendant's request for judgment as a matter of law or a new trial on the issue of damages will also be denied, as the Court finds that the damage award was supported by the evidence.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF
PENNSYLVANIA AND NEW JERSEY

ORDER

AND NOW, this 9th day of March, 1993, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant for judgment as a matter of law or, in the alternative, for a new trial is DENIED.

BY THE COURT:

s/ Harvey Bartle III
J

Entered: March 16, 1993

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

MEMORANDUM

Bartle, J. December 11, 1992

This is a civil rights action brought pursuant to 42 U.S.A. § 1983.[1] Plaintiff Walter T. Peters, Jr. ("Peters") alleges that the defendant Delaware River Port Authority of Pennsylvania and

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1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Appendix F

New Jersey ("DRPA") has infringed his constitutional rights of freedom of belief and association, by failing to reappoint him as its Secretary solely because he is a member of the New Jersey Republican Party.[2] At the conclusion of discovery, the parties filed cross motions for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[3] The issue before the Court is whether party affiliation is a constitutionally acceptable requirement for the position of Secretary of the DRPA.

The DRPA is an agency of Pennsylvania and New Jersey, formed by Compact between these two states and formally approved by Congress.[4] 36 P.S.A. § 3503; N.J.S.A. 32:3-1 et seq. (the "Compact"). The DRPA was created in 1931, among other

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2. Defendant previously filed a motion to dismiss alleging that DRPA was an "arm or instrumentality of the state, possessing Eleventh Amendment immunity from suit in federal cout. In the alternative, defendant moved for summary judgment, and requested that the cout strike plaintiff's claim for punitive damages. In its decision of March 4, 1992, this Court denied defendant's motion to dismis, holding that DRPA was not an arm or instrumentality of the state for the Eleventh Amendment purposes. We also denied the motion for summary judgment, on the grounds that their existed, at that point in the case, a genuine issue of material fact concerning the nature and duties of the position of Secretary. However, we granted defendant's motion to strike the claim for punitive damages.

3. Rule 56(c) provides that:

> The judgment sought shall be rendered forthwith if he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

4. Art. I, § 10, cl. 3 of the Constitution provides:

(Cont'd)

things, to operate and maintain the bridges owned jointly by Pennsylvania and New Jersey across the Delaware River and between the cities of Philadelphia and Camden. Under the Compact, DRPA has authority to construct and maintain facilities for the transportation of passengers, to improve and develop the Port District for port purposes, and to promote commerce on the Delaware River. It may also establish, maintain, and operate a rapid transit system between certain points in New Jersey and Pennsylvania (Compact, Art I).

The DRPA is governed by a sixteen member Board of Commissioners, eight of whom are appointed by the Governor of New Jersey for periods of five years. The Governor of New Jersey for periods of five years. The Governor of Pennsylvania appoints six of the commissioners for five year terms, with the elected Auditor General and the elected State Treasurer of Pennsylvania filling the remaining two positions for their four year terms. All commissioners, other than the Pennsylvania Auditor General and State Treasurer, continue to hold office after the expiration of their terms and until their successors are appointed and qualified (Compact, Art. II). The Board of Commissioners is empowered to elect various officers including a Secretary and Treasurer (Compact, Art. IV). The Bylaws of the DRPA further provide that the Board is to elect the Secretary for a two year term.

Peters became an officer of the DRPA when the Board of Commissioners elected him as Secretary on October 20, 1989 to fill a vacancy. However, the Board did not reappoint him when his term ended on January 20, 1991. Peters, a New Jersey Republican,

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(Cont'd)

> No State shall, without the consent of Congress . . . enter into any Agreement or compact with another State.

claims that he was not retained because the commissioners wanted the position for an individual affiliated with the New Jersey Democratic Party. The person who succeeded Peters as Secretary is in fact a Democrat.

In *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673 (1976), the Supreme Court struck a blow at the time honored system of political patronage. The Court's plurality opinion concluded that it is generally a violation of the First Amendment right of freedom of belief and association for a public employer to fire an employee on the basis of political affiliation.[5] Subsequent cases have extended *Elrod* protection to situations involving demotion, transfer and failure to reappoint based on political affiliation. *See Branti v. Finkel,* 445 U.S. 507, 100 S. Ct. 1287 (1980); *Rutan v. Republican Party of Illinois,* 41 U.S. 62, 110 S. Ct. 2729 (1990). The *Elrod* plurality declared, however, that some party based dismissals would be permissible in order to protect the ability of an administration to implement its policies as mandated by the electorate. *Elrod* at 2687. The plurality cared out an exception for policy making employees or employees in a position of confidence, placing the burden on the defendant to show that party affiliation "further[s] some vital government end by a means that is least restrictive of freedom of belief and association . . ." *Id.* at 360-63.

In *Branti v. Finkel,* 100 S. Ct. 2693, the Supreme Court, in a

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5. The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

majority opinion, altered the test for determining which positions are excepted from the general rule against patronage dismissals. Under *Branti,* the test is not whether an employee can be labeled a "policy maker," or "confidant," but whether "the hiring party can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 100 S. Ct. at 1287. The Court reasoned that "a position may be appropriately considered political even though it is neither confidential nor policy making in character." Conversely, the court observed that "party affiliation is not necessarily relevant to every policy making or confidential position." *Id.* Thus, although the extent and breadth of an employee's responsibilities may be instructive, they are not determinative.

Following *Branti,* the Court of Appeals of this Circuit affirmed that the crucial question is whether affiliation with a political party is somehow related to effective job performance. In *Burns v. County of Cambria,* for example, 971 F.2d 1015 (3d Cir. 1992) the Court of Appeals held that the positions of deputy sheriff and clerk investigator were protected from patronage dismissal. The court explained that the mere fact that a position requires loyalty and confidentiality does not automatically validate politically motivated dismissals. *Id.* at 1022-23. Rather, in order to qualify for the exception, an employee's duties must "relat[e] to '*partisan* political interests.' " *Id.* at 1022 (emphasis added) (Citations omitted). In *Mummau v. Ranck,* 531 F. Supp. 402, 404 (E.D. Pa. 1982) the court described the inquiry as a "functional analysis of the individual's position with an eye to determining whether it is likely that party affiliation could cause plaintiff, a public official, to be ineffective in carrying out his duties and responsibilities." There, the court upheld the dismissal of Lancaster County Assistant District Attorneys based on political affiliation, finding that their responsibilities implicated important

governmental policies, and entailed the duty to represent the interests of the Commonwealth. *See also Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991).

Defendant asserts that the position of Secretary entails broad policy making and confidential duties which place it within the *Elrod-Branti* exception to the general rule prohibiting patronage dismissals. Article III, Section (D) of the Bylaws of the DRPA details the duties of Secretary as follows:

> The secretary, reporting to the executive director, shall be the custodian of all records and the seal of the authority and shall keep accurate minutes of the meetings of the authority and all of the committees thereof. He shall, on behalf of the authority certify, when required, copies of the records, and shall execute legal instruments and documents on behalf of the authority when ordered to do so, and affix the seal of the authority to the same, *and shall perform such other duties as may be directed by the authority.* (emphasis added)

According to the DRPA, it took advantage of the ability to direct the Secretary to perform "other duties," creating a position with wide ranging authority and responsibilities. The DRPA relies on the official description of the position promulgated by the Board of Commissioners in 1983. This document charges the Secretary with, among other things: reviewing correspondence, reports, communications and sources of information and making appropriate recommendations to the Executive Director of the DRPA; assisting in planning for the improvement and expansion of DRPA facilities, operations, organization and management;

participating in high-level DRPA matters with Commissioners, committees, staff, public officers, and other public bodies; attending the executive sessions of the DRPA as requested and participating in all policy-forming discussions during executive sessions of the DRPA; acting as liaison and maintaining good public relations with other agencies and representing the Executive Director with other public agencies and members of the public; assisting the coordination of operational divisions and staff at the DRPA; and interpreting and executing DRPA policy.

Plaintiff contests defendant's characterization of the position, asserting that it is primarily ministerial in nature. He points out that the position, as described in the Bylaws, is entirely ministerial and that all the functions which allegedly entailed policy making are additional duties delegated pursuant to the "extra duties" clause. He further asserts that those "extra duties" clause. He further asserts that those "extra duties" do not establish that he had meaningful input into decisions concerning the nature and scope of major programs, or that his affiliation was likely to cause plaintiff to be ineffective in carrying out his duties and responsibilities. Plaintiff relies on testimony from the Chairman, Vice Chairman and Executive Director of the DRPA, all of whom stated that plaintiff's political affiliation had no bearing on his ability to perform his job.

In any event, even if the defendant's description of the position of Secretary is accurate, plaintiff contends that the bi-state nature of the DRPA mandates that the functions of the Secretary be carried out in an non-political manner. We agree. As explained above, in order for a dismissal based on party affiliation to be appropriate, the position must implicate party policies. *Burns v. County of Cambria,* 971 F.2d 1015; *Zold v. Township of Mantua,* 935 F.2d 633. The duties of the Secretary cannot involve partisan

political interests, for the simple reason that the Secretary does not serve an organization designed to further the political agenda of any one elected administration of officeholder. As explained above, the DRPA is a creature of both New Jersey and Pennsylvania. Fourteen of the sixteen commissioners are appointed by the Governors of Pennsylvania and New Jersey who may be of different political parties. Furthermore, the remaining two positions on the board are filled by the independently elected Auditor General and State Treasurer of Pennsylvania. The authors of the Compact sought to prevent either state from ever obtaining dominance over the other. Thus, the Compact provides not only equal state representation but also requires that all actions must be passed by a majority of the representatives of each state rather than by a simple majority of Board (Compact, Art. III). Under this scheme, the Secretary of the DRPA necessarily must be loyal to DRPA as a whole and not to either state or to any particular commissioner. If anything, the nature of the position compels the conclusion that the Secretary must be non-political to serve effectively in light of the potentially divergent interests of two different states, two different gubernatorial administrations, and the independently elected Auditor General and State Treasurer of Pennsylvania.

Defendant cites several cases in order to demonstrate that the Third Circuit has applied the *Elrod-Branti* exception to positions which allegedly entailed far less responsibility than that of the Secretary of the DRPA including, for example, a city solicitor, *Ness v. Marshal,* 660 F.2d 517 (3d Cir. 1981), an assistant district attorney, *Mummau v. Ranck,* and an assistant director of public information, *Brown v. Trench,* 787 F.2d 167 (3d Cir. 1986). Under *Branti,* however, the extent of an employee's responsibilities, while instructive is not controlling. In all the cases cited by defendant, the discharged employees served in one state or

municipal administration or under one elected official, with a mandate from the voters to advance that administration's or official's agenda. In *Ness v. Marshal,* for example, the court concluded that the Mayor of York could dismiss the city solicitor and assistant city solicitors on the basis of their political affiliation because such solicitors act as advisors to the city. They render legal opinions, draft ordinances, and negotiate contracts. The court explained that the Mayor, "has the right to receive the complete cooperation and loyalty of a trusted adviser" in these sensitive areas. *Id.* at 522. In drawing this conclusion, the court stated that the appropriate test is whether "a difference in party affiliation [would] be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office." *Id.* In contrast, it is difficult to see how any "*difference* in political affiliation" of a Secretary of the DRPA would hinder the ability of the DRPA to carry out its mandate.

Finally, the DRPA focuses on the provisions of the Bylaws that the Secretary is elected for a two year term. DRPA argues that this provision evidences the intention of the legislatures of Pennsylvania and New Jersey to provide the Commission with "high level Officers that are philosophically and politically aligned with the governing administrations" (Defendant's Brief at 13). However, the fact that a position is subject to a term limitation does not necessarily validate dismissals based on party affiliation. For example, in *Zold v. Township of Mantua,* 935 F.2d 633, the court held that the position of deputy township clerk was protected from patronage dismissals although it was subject to reappointment after one year. Similarly, in *Furlong v. Gudknecht,* 808 F.2d 233 (3d Cir. 1986) the court held the *Elrod-Branti* exception inapplicable to the position of the Second Deputy Recorder of Deeds for Bucks County, which was subject to reappointment every four years.

Appendix F

The Court's decision here will not unduly hamper the ability of DRPA to obtain loyal employees, dedicated to carrying out its policy. Nothing precludes as employer from discharging an employee for actual disloyalty, insubordination, or for failure faithfully to fulfill assigned duties or to further whatever policy the commission sets. As Justice Stevens pointed out in *Branti,* "[t]o the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is of course free to discharge them." *Branti,* 100 S. Ct. at 1296.

In invoking the *Elrod-Branti* exception, the defendant bears the burden of establishing how affiliation with a particular party is important to the job. In this case, defendant has shown only that plaintiff may be involved in policy making decisions, and may be privy to confidential information. Under *Branti* and its progeny, DRPA must do more than demonstrate the extent of its Secretary's responsibilities. Defendant has not shown how affiliation with a particular political party can be an important element of the job. Accordingly, the DRPA may not dismiss or fail to reelect its Secretary based on his or her political affiliation.

Because no genuine issue of material fact exists, plaintiff's motion for partial summary judgment will be granted and defendant's motion for partial summary judgment will be denied.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

ORDER

AND NOW, this 11th day of December, 1992, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the Motion of defendant Delaware River Port Authority for Partial Summary Judgment, and for a pretrial hearing is DENIED and that the Motion of plaintiff Walter T. Peters, Jr. for Partial Summary Judgment is GRANTED. The Delaware River Port Authority may not dismiss or fail to reelect its Secretary based on the Secretary's political party affiliation.

BY THE COURT:

s/ Harvey Bartle III
J.

APPENDIX G — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 6, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

MEMORANDUM

BARTLE, J. March 6, 1992

This is a civil rights action brought pursuant to 42 U.S.C. § 1983.[1] Plaintiff Walter T. Peters, Jr. ("Peters") alleges that the

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1. 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

defendant Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") has infringed his constitutional rights of free speech and association, by failing to reappoint him as its Secretary solely because he is a member of the New Jersey Republican Party.

Now before this Court is the motion of defendant, DRPA, to Dismiss Plaintiff's Complaint, or in the Alternative for Summary Judgment, pursuant to Rules 12(b)(6) and 56, respectively, of the Federal Rules of Civil Procedure. In addition, the DRPA requests the Court to strike plaintiff's claim for punitive damages and to order plaintiff to file a more definite statement of his state law based claims.

Rule 12(b) of the Federal Rules of Civil Procedure states in pertinent part:

> . . . the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . If, on a motion asserting the defense numbered (6) . . . matters outside the pleading are presented to . . . the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .

When making a determination under Rule 12(b)(6) the Court cannot consider matters outside the pleadings. Since the Court has been presented with and has considered matters beyond the pleadings, defendant's motion to dismiss will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Appendix G

Rule 56(c) provides the standard for ruling on a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. Rule Civ. P. 56(c). *See also, Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). It is well settled law that in deciding motions for summary judgment, the question to consider when determining if there is a "genuine issue of material fact" is whether there is sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *Weldon v. Kraft. Inc.,* 896 F.2d 793, 797 (3d Cir. 1990). The evidence must be viewed in the light most favorable to the non-moving party. *Weldon* at 797.

Peters became an officer of the DRPA when he was appointed Secretary by its Board of Commissioners on October 20, 1989. At the end of his term as Secretary on January 20, 1991, the Board of Commissioners did not reappoint him to that position. As stated above, Peters alleges that he was not reappointed solely because he was affiliated with the New Jersey Republican Party. He claims that the Commissioners wanted the position to be occupied instead by an individual affiliated with the New Jersey Democratic Party. The person who succeeded Peters as Secretary is a Democrat.

Defendant DRPA first argues that summary judgment should

be granted in its favor, under Rule 56 of the Federal Rules of Civil Procedure, because it is an "arm or instrumentality" of both the Commonwealth of Pennsylvania and the State of New Jersey. If so, DRPA contends it is protected from suit in the federal courts by the Eleventh Amendment of the Constitution and is not subject to suit as a "person" under 42 U.S.C. § 1983.

The Eleventh Amendment of the Constitution[2] bars suits in federal court against a state unless the state has waived its immunity or unless Congress exercises its power to override that immunity. *Will v. Michigan Department of State Police*, __ U.S. __, 109 S.Ct. 2304, 2309 (1989). No waiver argument is made here. Moreover, Congress did not disturb the states' Eleventh Amendment immunity in passing 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332 (1979). Accordingly, a state and any political entity which qualifies as an "arm of the state," are not "persons" within the meaning of 1983. *Will*, at 2308-11.

The DRPA was formed by a Compact, approved by Congress, between the Commonwealth of Pennsylvania and the State of New Jersey. The DRPA was created, among other things, to operate and

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2. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

The Supreme Court has interpreted the Amendment to protect an unconsenting state from "suit in federal court by its own citizens as well as those of another state." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

maintain the bridge owned jointly by the two states across the Delaware River between the Cities of Philadelphia and Camden. Under the Compact DRPA has authority to construct and maintain facilities for the transportation of passengers, to improve and develop the Port District for port purposes, and to promote commerce on the Delaware River. It may also establish, maintain and operate a rapid transit system between certain points in New Jersey and Pennsylvania. Compact, Art. I.

According to the Compact, the DRPA is financially self-sufficient. It is permitted to raise revenues by means of bonds, and collect tolls and other use charges to satisfy its obligations. Compact, Art. IV(j). Furthermore, the Compact specifically provides that the DRPA has no power to pledge the credit or create any debt of either the Commonwealth of Pennsylvania or the State of New Jersey. Hence, the debts of the DRPA are not the debts of either state. Compact, Art. VII.

In order to determine whether the DRPA is an arm or instrumentality of Pennsylvania and New Jersey, and therefore, immune from suit under 42 U.S.C. § 1983, the Court of Appeals of the Third Circuit has set out guidelines which require the consideration and analysis of three key factors: (1) the source of DRPA's funding to determine whether Pennsylvania and New Jersey have immunized themselves from responsibility for DRPA's debts; (2) the status of DRPA under state law, that is, the treatment of the agency under state law; and (3) the degree of autonomy from state control which DRPA enjoys. *Bolden v. Southeastern Pennsylvania Transportation Authority,* Slip Op. Nos. 90-1435 and 90-1478 (3d Cir. decided December 31, 1991); *Fitchik v. New Jersey Transit Rail Operation Inc.,* 873 F.2d 655 (3d Cir. 1989). In both these cases, the Court of Appeals held that the entities in issue were not an arm or instrumentality of the state for purposes of the Eleventh Amendment.

Appendix G

The first and most important factor is the source of DRPA funding, that is, "whether any judgment [against the DRPA] would be paid from the state treasury." *Bolden* at 24; *Fitchik* at 659. According to the Compact, DRPA is financially self-sustaining, with the authority to raise revenues by means of bonds and toll collections. Compact, Art. IV(j).[3] Significantly, in *Fitchik*, the Court of Appeals found that the New Jersey Transit Rail Operations, Inc. ("NJTRO") was not an arm or instrumentality of New Jersey even though the state provided 33% of the NJTRO's revenues. In *Bolden* the Court of Appeals arrived at the same conclusion concerning the Southeastern Pennsylvania Transportation Authority ("SEPTA"), even though Pennsylvania provides 27% of its revenues. Here, DRPA is financially self-sustaining and is not dependent on any state for funding. Additionally, in *Bolden* and *Fitchik*, the Court of Appeals for the Third Circuit also relied on the fact that the states in question were under no obligation to pay the debts of NJTRO or SEPTA or to reimburse those entities for judgments against them. So also, in the case at bar, DRPA is financially independent of either state, as the Compact which created DRPA specifically provides that the debts of DRPA are not the debts of either Pennsylvania or New Jersey. Compact, Art. VII. Consequently, the funding factor, which the Court of Appeals has held to be the most important of the considerations, weighs very heavily in support of the conclusion that DRPA is not an arm or instrumentality of either state.

The second factor to consider, in determining whether DRPA is an arm or instrumentality of the states and therefore not a

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3. Defendant DRPA seeks to diminish this factor by pointing out that DRPA was initially funded by contributions from the States. That factor becomes irrelevant when, as here, the entity becomes financially self-sustaining after the initial state contributions.

"person" under 51983, is the status which DRPA has under state law. *Bolden* at 27. In *Yancoskie v. Delaware River Port Authority,* 478 Pa. 39, 387 A.2d 41 (1978), a personal injury suit, the Pennsylvania Supreme Court held that DRPA was not an arm of the Commonwealth and, therefore, was not entitled to sovereign immunity. The court stated:

> We believe that an analysis of the legislative acts defining the purposes and powers of the Delaware River Port Authority, together with the relevant judicial decisions, requires a conclusion that . . . the Authority is not 'an integral part of the Commonwealth,' . . . and that it is therefore subject to suit, as are 'political subdivisions or governmental entities other than the Commonwealth itself,' (Citations omitted).

Yancoskie at 42.

Similarly, the New Jersey Supreme Court has held, in a personal injury suit, that the DRPA does not enjoy immunity under the New Jersey Tort Claims Act. *Bell v. Bell,* 83 N.J. 417, 416 A.2d 829 (1980).

Like SEPTA in *Bolden* and NJTRO in *Fitchik,* the DRPA possesses "attributes not characteristic of an arm of the state." *Bolden,* at 28. The DRPA, for example, has the power to enter into contracts and to make purchases without state approval. Compact, Art. IV(f)-(h). *See also, Bolden* at 28. On the other hand, like SEPTA in *Bolden* and NJTRO in *Fitchik,* the DRPA possesses some attributes under state law which are normally associated with the state. These include the exemption from state property

taxation, Compact, Art. XI, and the power of eminent domain, Compact, Art. IV(k). *See, Bolden* at 28. However, on balance, DRPA's status under state law weighs heavily in support of the conclusion that DRPA is not a state arm or instrumentality.

The third factor to consider in deciding whether DRPA is a "person" under 1983 is DRPA's autonomy, that is, the lack of control which Pennsylvania and New Jersey can exercise over the DRPA. The chief fact in the present case which seems to point to a measure of state control is the manner in which the sixteen members of the Board of Commissioners of the DRPA are selected. Membership is split evenly, with eight members from New Jersey and eight from Pennsylvania. The Governor of New Jersey appoints all that state's members while the Governor of Pennsylvania appoints six of the eight members representing the Commonwealth. The other two Pennsylvania Commissioners are the Auditor General and the State Treasurer who serve ex-officio. The Board of Commissioners, in turn, appoints the officers of the DRPA, one of which is the Secretary, the position held by the plaintiff Peters. In *Bolden* the make-up of the SEPTA board guaranteed slightly more autonomy. Only five out of the fifteen SEPTA board members are appointed by state officials, the rest being appointed by the counties that SEPTA serves. *Bolden* at 29. In *Fitchik,* three out of the seven members were required to be members of New Jersey's executive branch and the New Jersey Governor has veto power over the board's actions. *Fitchik,* at 663.

Other facts support the argument that DRPA is autonomous, such as DRPA's separate corporate existence, its power to enter into contracts, its power to hold property, and its power to set tolls. On balance, however, because of each state's power in appointing DRPA's Board of Commissioners, the autonomy factor weighs "slightly" in favor DRPA being an arm or instrumentality of the states. *Bolden* at 29.

Appendix G

In order to make the final determination whether DRPA is an arm or instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey, we are required to take into account the totality of the three factors discussed above. In this case, funding, the most important factor, weighs heavily against a finding that DRPA is an arm or instrumentality of the states. Of the other two factors, the status under state law weighs heavily against, and the autonomy from state control weighs slightly in favor of a finding that DRPA is an arm or instrumentality of the states. DRPA has less of a nexus with the states in issue than SEPTA had in *Bolden* and NJTRO had in *Fitchik*, where the Court of Appeals found that those entities were not arms of the state. Under the facts here, we must conclude that the DRPA is not an arm or instrumentality of Pennsylvania or New Jersey. Consequently, DRPA is not entitled to rely on the immunity from suit conferred by the Eleventh Amendment and is subject to suit as "person" under 42 U.S.C. § 1983.

Defendant's heavy reliance on the case of *Port Authority Police Benevolent Association. Inc. v. Port Authority* of New York and New Jersey, 819 F.2d 413 (3d Cir. 1987), ("PBA"), in support of its position that the DRPA is an alter ego of Pennsylvania or New Jersey, is misplaced. The entity involved in *PBA* was the Port Authority of New York and New Jersey ("Authority"). The differences between the Authority and the DRPA are manifest. The Court in *PBA* notes specifically that the Courts of New York and New Jersey have consistently held that the Authority is a state agency performing functions on behalf of the state. *PBA* at 415. In the present case, to the extent that the states have decided the question, they have held to the contrary. *See, Yancoskie,* and *Bell, supra.* In *PBA,* the Court determined that any judgment against the Authority could have some impact upon the state treasuries. Under the controlling statute, if a judgment entered against the Authority

depleted its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses. *PBA* at 416. In the present case, under the Compact, the debts of the DRPA are not the debts of either Pennsylvania or New Jersey and the DRPA has no power to pledge the credit of either state. Compact, Art. VII. In *PBA*, the actions of the Commissioners of the Authority are subject to veto by the Governor of either state. In the instant case, no such veto power exists. We, therefore, do not believe that the *PBA* case supports defendant's claim in this case that DRPA is an arm or instrumentality of the states.

DRPA next argues that it is entitled to summary judgment because plaintiff Peters, as Secretary of DRPA, was a policymaker or a confidential employee and therefore could be replaced solely on the basis of his political affiliation.

The Supreme Court has held that it is a violation of a public employee's civil rights under 42 U.S.C. § 1983, to demote, transfer, fire or not reappoint to a position, such an employee on the basis of his or her political affiliation. *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673 (1976); *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287 (1980); and *Rutan v. Republican Party of Illinois,* __ U.S. __, 110 S.Ct. 2729 (1990). However, at the same time, the Supreme Court has recognized certain exceptions to this rule. In order for the hiring authority to govern effectively, an exception has been made for policymaking employees or employees in a position of confidence. These employees may properly be chosen or dismissed because of their political affiliation. *Elrod,* 427 U.S. at 367; *Branti,* 445 U.S. at 518; *Rutan,* 110 S. Ct. at 2735 n. 5, 2745.

The reasoning behind this exception is that there are situations which arise where an employer has a legitimate interest in employing persons who will loyally implement the policies of a

political party and guard confidential information from improper disclosures. *Elrod*, 427 U.S. at 365-68; *Branti*, 445 U.S. at 518; and *Rutan*, 110 S.Ct. at 2735, n. 5. As stated by the Supreme Court in *Branti:*

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

Therefore, the issue to be determined in this case is whether political affiliation is an appropriate requirement for the effective performance of the office of Secretary of the DRPA. The determination is very fact specific. *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir. 1991). The Court of Appeals for the Third Circuit in *Zold* held that a public employee would not be protected from dismissal due to party affiliation if such differences would "be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office . . . " *Zold*, at 635. "The key factor . . . [is] not whether the employee was a supervisor or had a great deal of responsibility but whether the employee has 'meaningful input into decision making concerning the nature and scope of a . . . program.' " (Citations omitted) *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986).

In this case, both Peters and DRPA have supported their positions with affidavits describing the duties and responsibilities necessary for 'he effective performance as Secretary of the DRPA.

Peters states, for example, that while he was Secretary, he was custodian of the records and seal of the DRPA. He coordinated meetings of the Board of Commissioners and its Committees, but had no input into the substance of the agenda of the meetings. He made no decisions as to when the meetings were to be held. He furnished copies of the agenda and minutes of prior meetings upon request. He occasionally attended ceremonial functions. According to Peters, these duties were purely ministerial and in no way depended upon party affiliation for their effective performance.

DRPA, on the other hand, has submitted the affidavit of its General Counsel, which paints a much different picture of the duties and responsibilities of the Secretary. According to that affidavit the Secretary has record-keeping functions which entail more than mere clerical or non-discretionary duties, including developing the agenda for Board of Commissioner and Committee meetings. He acts as an advisor to the President of the DRPA concerning the subject matter of internal and external correspondence. He helps plan improvements and expansion of DRPA facilities, and has direct input into and otherwise participates in all policy-forming discussions. The Secretary's job also includes public relations duties with other agencies. According to DRPA, these duties, among others, make the Secretary of the DRPA a policymaker and a confidential employee in whom party affiliation is necessary for effective performance.

Based on the foregoing, there exist genuine issues of material fact. Consequently, the Motion of defendant DRPA for Summary Judgment with respect to whether Peters held a policymaking or confidential position, will be denied.

Defendant DRPA also seeks to dismiss plaintiff's claim for

punitive damages. It is well established that municipalities are not subject to punitive damages under 42 U.S.C. § 1983. *City of Newport v. Fact Concerts. Inc.*, 453 U.S. 247, 258-267 (1981). The question is whether that rule extends to an entity like the DRPA. This issue was addressed in *Bolden* where the entity involved was the SEPTA. The Court of Appeals stated:

> SEPTA, of course, is not a governmental unit in the traditional sense, but it shares many characteristics with federal, state, and local government agencies. . . . While SEPTA's ties to state government are not close enough or exclusive enough to persuade us that SEPTA should be regarded as an alter ego of the Commonwealth for Eleventh Amendment purposes, SEPTA's ties to all levels of government taken together are sufficient to convince us that SEPTA may be analogized to a government entity for purposes of determining whether SEPTA should be liable for punitive damages. Thus, the immunity from punitive damages enjoyed by all levels of government in 1871 weighs in SEPTA's favor here. (Footnote omitted).

Bolden, at 54.

The same can be said of the DRPA. Accordingly, the motion of defendant to dismiss plaintiff's claim for punitive damages will be granted.

Finally, defendant DRPA has moved, under Rule 12(e) of the

Federal Rules of Civil Procedure,[4] for a more definite statement of plaintiff's state law claims. DRPA contends that 3 and 21(a) of the Complaint, the two paragraphs which make reference to state law claims, do not identify the applicable state statutes or state common law principles, upon which plaintiff bases his allegations. While admittedly not a model of specificity, Rule 12(e) provides that a motion for a more definite statement may be granted only if the complaint is "so vague and ambiguous that [the defendant] cannot reasonably be required to frame a responsive pleading." *Blue Line Coal Co., Inc. v. Equibank*, 683 F. Supp. 493, 498 (E.D. Pa. 1988). This is not the case here. Defendant's motion under Rule 12(e) will be denied.

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4. Rule 12(e) of the Federal Rules of Civil Procedure states in pertinent part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. . . .

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6814

WALTER T. PETERS, JR.

v.

DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY

ORDER

AND NOW, this 6th day of March, 1992, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the Motion of defendant Delaware River Port Authority of Pennsylvania and New Jersey for Summary Judgment is DENIED.

It is further ORDERED that the Motion of defendant Delaware River Port Authority of Pennsylvania and New Jersey to Strike plaintiff's Claim for Punitive Damages is GRANTED.

It is further ORDERED that the Motion of defendant Delaware River Port Authority of Pennsylvania and New Jersey for a more definite statement of plaintiff's state law claims is DENIED.

BY THE COURT:

s/ Harvey Bartle III
J.

APPENDIX H — COMPACT OF DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY, ARTICLES I, II, IV, XI

AGREEMENT

Between

THE COMMONWEALTH OF PENNSYLVANIA
And
THE STATE OF NEW JERSEY

CREATING THE DELAWARE RIVER PORT AUTHORITY (SUCCESSOR TO THE DELAWARE RIVER JOINT COMMISSION) AS A BODY CORPORATE AND POLITIC AND DEFINING ITS POWERS AND DUTIES.

The Commonwealth of Pennsylvania and the State of New Jersey do hereby solemnly covenant and agree each with the other as follows:

ARTICLE I

The body corporate and politic, heretofore created and known as the Delaware River Joint Commission hereby is continued under the name of the Delaware River Port Authority (hereinafter in this agreement called the "Commission"), which shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and which shall be deemed to be exercising an essential governmental function in effectuating such purposes, to wit:

(a) The operation and maintenance of the bridge, owned jointly by the two States across the Delaware River between the City of Philadelphia in the Commonwealth of Pennsylvania and

the City of Camden in the State of New Jersey, including its approaches, and the making of additions and improvements thereto.

(b) The effectuation, establishment, construction, operation and maintenance of railroad or other facilities for the transportation of passengers across any bridge or tunnel owned or controlled by the Commission, including extensions of such railroad or other facilities within the City of Camden and the City of Philadelphia necessary for efficient operation in the Port District.

(c) The improvement and development of the Port District for port purposes by or through the acquisition, construction, maintenance or operation of any and all projects for the improvement and development of the Port District for the port purposes, or directly related thereto, either directly by purchase, lease or contract, or by lease or agreement with any other public or private body or corporation or in any other manner.

(d) Co-operation with all other bodies interested or concerned with, or affected by the promotion, development or use of the Delaware River and the Port District.

(e) The procurement from the government of the United States of any consents which may be requisite to enable any project within its powers to be carried forward.

(f) The construction, acquisition, operation and maintenance of other bridges and tunnels across or under the Delaware River, between the City of Philadelphia and the State of New Jersey, including approaches and the making of additions and improvements thereto.

(g) The promotion as a highway of commerce of the Delaware River, and the promotion of increased passenger and freight commerce on the Delaware River and for such purpose the publication of literature and the adoption of any other means as may be deemed appropriate.

(h) To study and make recommendations to the proper authorities for the improvement of terminal, lighterage, wharfage, warehouse and other facilities necessary for the promotion of commerce on the Delaware River.

(i) Institution through its counsel, or such other counsel as it shall designate, or intervention in, any litigation involving rates, preferences, rebates or other matters vital to the interest of the Port District; *provided* that notice of any such institution of or intervention in litigation shall be given promptly to the Attorney General of the Commonwealth of Pennsylvania and to the Attorney-General of the State of New Jersey, and provision for such notices shall be made in a resolution authorizing any such intervention or litigation and shall be incorporated in the minutes of the commission.

(j) The establishment, maintenance, rehabilitation, construction and operation of a rapid transit system for the transportation of passengers, express, mail, and baggage between points in New Jersey communities within the Port District and within a thirty-five (35) mile radius of the City of Camden, New Jersey, and points within the City of Philadelphia, Pennsylvania, and intermediate points. Such system may be established by either utilizing existing rapid transit systems, railroad facilities, highways and bridges within the territory involved or by the construction or provision of new facilities where deemed necessary.

(k) The performance of such other functions which may be of mutual benefit to the Commonwealth of Pennsylvania and the State of New Jersey insofar as concerns the promotion and development of the Port District for port purposes and the use of its facilities by commercial vessels.

Ref. — Pennsylvania 1951 — Act No. 214, P. L. 1010. New Jersey 1951 — Chapter 288. R.S. 32:3-2.

ARTICLE II

The Commission shall consist of sixteen commissioners, eight resident voters of the Commonwealth of Pennsylvania and eight resident voters of the State of New Jersey, who shall serve without compensation.

The present members of the Commission, including ex-officio members, shall continue to serve, respectively, as commissioners until the expiration of their terms or the terms of office by virtue of the holding of which they are members of the Commission and until succeeding commissioners shall be appointed and qualify, except that the terms of the present members of the Commission for the Commonwealth of Pennsylvania shall expire as of the date of the coming into force of the supplemental compact or agreement authorized by the Act of 1951 General Assembly of said Commonwealth providing for amendment of this article.

The commissioners for the State of New Jersey shall be appointed by the Governor of New Jersey with the advice and consent of the Senate of New Jersey, for terms of five years, and in case of a vacancy occurring in the office of commissioner during a recess of the Legislature, it may be filled by the Governor by an ad

interim appointment which shall expire at the end of the next regular session of the Senate unless a successor shall be sooner appointed and qualify and, after the end of the session, no ad interim appointment to the same vacancy shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it, and no person nominated for any such vacancy shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate.

Six of the eight commissioners for the Commonwealth of Pennsylvania shall be appointed by the Governor of Pennsylvania for terms of five years. The Auditor General and the State Treasurer of said Commonwealth shall ex-officio be commissioners for said Commonwealth, each having the privilege of appointing a representative to serve in his place at any meeting of the Commission which he does not attend personally.

All commissioners shall continue to hold office after the expiration of the terms for which they are appointed or elected until their respective successors are appointed and qualify, but no period during which any commissioner shall hold over shall be deemed to be an extension of his term of office for the purpose of computing the date on which his successor's term expires.

Ref. — Pennsylvania 1951 — Act No. 214, P. L. 1010. New Jersey 1951 — Chapter 288. R.S. 32:3-3.

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ARTICLE IV

For the effectuation of its authorized purposes the Commission is hereby granted the following powers:

(a) To have perpetual succession.

(b) To sue and be sued.

(c) To adopt and use an official seal.

(d) To elect a chairman, vice-chairman, secretary and treasurer, and to adopt suitable by-laws for the management of its affairs. The secretary and treasurer need not be members of the Commission.

(e) To appoint, hire, or employ counsel and such other officers and such agents and employees as it may require for the performance of its duties, by contract or otherwise, and fix and determine their qualifications, duties and compensation.

(f) To enter into contracts.

(g) To acquire, own, hire, use, operate and dispose of personal property.

(h) To acquire, own, use, lease, operate, mortgage and dispose of real property and interests in real property, and to make improvements thereon.

(i) To grant by franchise, lease or otherwise, the use of any property or facility owned or controlled by the Commission and to make charges therefor.

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(j) To borrow money upon its bonds or other obligations, either with or without security, and to make, enter into and perform any and all such covenants and agreements with the holders of such bonds or other obligations as the Commission may determine to be necessary or desirable for the security and payment thereof, including without limitation of the foregoing, covenants and agreements as to the management and operation of any property or facility owned or controlled by it, the tolls, rents, rates or other charges to be established, levied, made and collected for any use of any such property or facility, or the application, use and disposition of the proceeds of any bonds or other obligations of the Commission or the proceeds of any such tolls, rents, rates or other charges or any other revenues or moneys of the commission.

(k) To exercise the right of eminent domain within the Port District.

(l) To determine the exact location, system and character of and all other matters in connection with any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, operate or control.

(m) In addition to the foregoing, to exercise the powers, duties, authority and jurisdiction heretofore conferred and imposed upon the aforesaid The Delaware River Join Commission by the Commonwealth of Pennsylvania or the State of New Jersey, or both of the said two States.

(n) To exercise all other powers not inconsistent with the constitutions of the two States or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or assessments, and generally to exercise in connection with its property and affairs,

and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

(o) To acquire, purchase, construct, lease, operate, maintain and undertake any project, including any terminal, terminal facility, transportation facility, or any other facility of commerce and to make charges for the use thereof.

(p) To make expenditures anywhere in the United States and foreign countries, to pay commissions, and hire or contract with experts and consultants, and otherwise to do indirectly anything which the commission may do directly.

The Commission shall also have such additional powers as may hereafter be delegated to or imposed upon it from time to time by the action of either State concurred in by legislation of the other.

It is the policy and intent of the Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey that the powers granted by this article shall be so exercised that the American system of free competitive private enterprise is given full consideration and is maintained and furthered. In making its reports and recommendations to the Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey on the need for any facility or project which the Commission believes should be undertaken for the promotion and development of the Port District, the Commission shall include therein its findings which fully set forth that the facility or facilities operated by private enterprise within the Port District and which it is intended shall be supplanted or added to are not adequate.

Ref. — Pennsylvania 1951 — Act No. 214, P. L. 1010. New Jersey 1951 — Chapter 288, R.S. 32:3-5.

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* * *

ARTICLE XI

The effectuation of its authorized purposes by the Commission is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and since the Commission will be performing essential governmental functions in effectuating said purposes, the Commission shall not be required to pay any taxes or assessments upon any property acquired or used by it for such purposes, and the bonds or other securities or obligations issued by the Commission, their transfer and the income therefrom (including any profits made on the sale thereof) shall at all times be free from taxation within the Commonwealth of Pennsylvania and the State of New Jersey.

To the end that municipalities may not suffer undue loss of tax revenue by reason of the acquisition and ownership of property therein by the Commission, the Commission is hereby authorized and empowered, in its discretion, to enter into a voluntary agreement or agreements with any municipality, whereby it will undertake to pay a fair and reasonable sum or sums to compensate the said municipality for any loss of tax revenue in connection with any property acquired by the Commission after one thousand nine hundred and fifty other than property acquired for bridge, tunnel or passenger transportation purposes. Any such payment or payments which the Commission is hereby authorized and empowered to make may be made on an annual basis, in which case the payment or payments shall not be in excess of the amount of the taxes upon the property when last assessed prior to the time of its acquisition by the Commission, or such payment or payments may be made in

a lump sum or sums, or over a stated period of years, as shall be agreed upon by and between the Commission and such municipality. Every municipality wherein the property shall be acquired by the Commission is authorized and empowered to enter into such agreement or agreements with the Commission to accept the payment or payments which the Commission is herein authorized and empowered to make.

(5) Article XII of said agreement is amended to read as follows:

Ref. — Pennsylvania 1951 — Act No. 214, P. L. 1010. New Jersey 1951 — Chapter 288. R.S. 32:3-12.

* * *

APPENDIX I — BY-LAWS OF DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY, ARTICLE III (D)

* * *

D—Secretary

The Secretary, reporting to the Executive Director, shall be the custodian of all records and the seal of the Authority and shall keep accurate minutes of the meetings of the Authority and all of the committees thereof. He shall, on behalf of the Authority certify, when required, copies of records and shall execute legal instruments and documents on behalf of the Authority when ordered to do so, and affix the seal of the Authority to the same, and shall perform such other duties as may be directed by the Authority.

* * *